Commonwealth of Massachusetts

ATTORNEY-GENERAL'S REPORT

1916

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The Commonwealth of Massachusetts.

REPORT

OF THE

ATTORNEY-GENERAL

FOR THE

YEAR ENDING JANUARY 17, 1917.

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1917.

The Commonwealth of Massachusetts.

Department of the Attorney-General,
Boston, Jan. 17, 1917.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith my report for the year ending this day.

Very respectfully,

HENRY C. ATTWILL,
Attorney-General.

The Commonwealth of Massachusetts.

DEPARTMENT OF THE ATTORNEY-GENERAL,
State House.

Attorney-General.
HENRY C. ATTWILL.

Assistants.
NELSON P. BROWN.
H. WARE BARNUM.
WM. HAROLD HITCHCOCK.
ARTHUR E. SEAGRAVE.
JOHN W. CORCORAN.
CHARLES W. MULCAHY.

Chief Clerk.
LOUIS H. FREESE.

Statement of Appropriation and Expenditures.

Appropriation for 1916,	$48,000 00
Expenditures.	
For law library,	$2,057 42
For salaries of assistants,	17,101 25
For clerks,	6,689 72
For office stenographers,	4,425 00
For telephone operator,	608 00
For special legal services and expenses,	5,647 02
For office expenses,	1,309 00
For court expenses,	6,204 57
Total expenditures,	$44,041 98
Costs collected,	2,731 16
Net expenditures,	$41,310 82

The Commonwealth of Massachusetts.

Department of the Attorney-General,
Boston, Jan. 17, 1917.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 8 of chapter 7 of the Revised Laws I herewith submit my report for the year ending this day.

The cases requiring the attention of this department during the year, to the number of 7,450 are tabulated below: —

Corporate franchise tax cases,	1,096
Extradition and interstate rendition,	154
Grade crossings, petitions for abolition of,	85
Indictments for murder,	51
Inventories and appraisals,	15
Land Court petitions,	103
Land-damage cases arising from the taking of land by the Harbor and Land Commission,	4
Land-damage cases arising from the taking of land by the Charles River Basin Commission,	23
Land-damage cases arising from the taking of land by the Massachusetts Highway Commission,	23
Land-damage cases arising from the taking of land by the Directors of the Port of Boston,	3
Land-damage cases arising from the taking of land by the Metropolitan Water and Sewerage Board,	3
Land-damage cases arising from the taking of land by the Metropolitan Park Commission,	22
Land-damage cases arising from the taking of land by the Armory Commissioners,	1
Land-damage cases arising from the taking of land by the State House Building Commission,	7
Miscellaneous cases arising from the work of the above-named commissions,	36
Miscellaneous cases,	586
Petitions for instructions under inheritance tax laws,	59
Public charitable trusts,	112
Settlement cases for support of persons in State Hospitals,	35
All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth,	5,032

Capital Cases.

Indictments for murder pending at the date of the last annual report have been disposed of as follows:—

Elizabeth C. Cannon, indicted in Hampden County, December, 1915, for the murder of Lucille Monty Thomas, at Russell, on Nov. 8, 1915. She was arraigned Jan. 4, 1916, and pleaded not guilty. Richard J. Morrissey, Esq., appeared as counsel for the defendant. Later the defendant retracted her former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was released on her own recognizance. The case was in charge of District Attorney Joseph B. Ely.

Salvatore Mazzaferro, indicted in Plymouth County, October, 1915, for the murder of Pasquale Femia, at Hingham, on Aug. 1, 1915. He was arraigned Oct. 27, 1915, and pleaded not guilty. John E. Crowley, Esq., appeared as counsel for the defendant. On Feb. 24, 1916, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for a term not exceeding eight years nor less than five years. The case was in charge of District Attorney Albert F. Barker.

Julian Olesiewski and Peter Olesiewski, indicted in Hampshire County, October, 1915, for the murder of Bolack Klmocy, at Easthampton, on July 27, 1915. The defendants were arraigned Oct. 27, 1915, and each pleaded not guilty. N. Seelye Hitchcock, Esq., appeared as counsel for the defendants. In the case of Julian Olesiewski, on Feb. 28, 1916, the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for life. In the case of Peter Olesiewski, on Feb. 28, 1916, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant

was sentenced to State Prison for a term not exceeding three and one-half years nor less than two and one-half years. The cases were in charge of District Attorney John H. Schoonmaker.

Domenico Raia, indicted in Suffolk County, September, 1915, for the murder of Guiseppe Varano, at Boston, on Aug. 3, 1915. He was arraigned Nov. 19, 1915, and pleaded not guilty. John F. McDonald, Esq., and F. P. Fralli, Esq., appeared as counsel for the defendant. Later the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to one year in the House of Correction. The case was in charge of District Attorney Joseph C. Pelletier.

Anton Retkovitz, indicted in Bristol County, June, 1914, for the murder of Domka Peremebida. He was arraigned June 12, 1914, and pleaded not guilty. Frank M. Silvia, Esq., and Harold E. Clarkin, Esq., appeared as counsel for the defendant. In November, 1914, the defendant was tried by a jury before Dubuque, J. The result was a verdict of guilty of murder in the first degree. The defendant's bill of exceptions was sustained. In January, 1916, the defendant was again tried by a jury before Morton, J. The result was a verdict of guilty of murder in the first degree. The defendant was thereupon sentenced to death by electrocution during the week beginning March 12, 1916, which sentence was executed March 16, 1916. The case was in charge of District Attorney Joseph T. Kenney.

Joseph L. Roy, indicted in Plymouth County, February, 1915, for the murder of Albertine Roy, at Brockton, on Nov. 3, 1914. Feb. 1, 1915, the defendant was committed to the Bridgewater State Hospital for observation. W. F. Kane, Esq., appeared as counsel for the defendant. On Mar. 1, 1916, the court directed that a verdict be entered of not guilty by reason of insanity, and ordered the defend-

ant committed to the Bridgewater State Hospital for life. The case was in charge of District Attorney Albert F. Barker.

Bow Young, indicted in Hampden County, September, 1915, for the murder of Ng Hong, at Springfield, on Sept. 12, 1915. He was arraigned Sept. 24, 1915, and pleaded not guilty. Herbert P. Ware, Esq., appeared as counsel for the defendant. Later the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney Joseph B. Ely.

Indictments for murder found since the date of the last annual report have been disposed of as follows: —

Domenico Albanese, indicted in Plymouth County, October, 1916, for the murder of Fortunato Aprile, at Hingham, on Aug. 6, 1916. He was arraigned Oct. 24, 1916, and pleaded not guilty. Z. T. Zottoli, Esq., appeared as counsel for the defendant. On Oct. 26, 1916, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for a term not exceeding ten years nor less than six years. The case was in charge of District Attorney Albert F. Barker.

Eldridge D. Atwood, indicted in Suffolk County, August, 1916, for the murder of Wilfred E. Harris, at Boston, July 18, 1916. George F. Bean, Esq., and James E. Henchey, Esq., appeared as counsel for the defendant. The defendant was arraigned Jan. 2, 1917, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney Joseph C. Pelletier.

Jacob Batckunas, indicted in Worcester County, January, 1916, for the murder of Victor Sawiscki, at Worcester, on Nov. 4, 1915. David F. O'Connell, Esq., appeared as counsel for the defendant. The defendant was arraigned Feb. 2, 1916, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney James A. Stiles.

John Brown, indicted in Plymouth County, February, 1916, for the murder of William H. McFadden, at West Bridgewater, on Oct. 31, 1915. W. F. Kane, Esq., and J. P. Vahey, Esq., appeared as counsel for the defendant. The defendant was arraigned June 23, 1916, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney Albert F. Barker.

Frank Camarra, indicted in Essex County, July, 1916, for the murder of Nicola Ciccarelli, at Lawrence, on July 12, 1916. He was arraigned July 18, 1916, and pleaded not guilty. John A. O'Mahoney, Esq., appeared as counsel for the defendant. On Sept. 26, 1916, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was released on his own recognizance. The case was in charge of District Attorney Louis S. Cox.

Antonio Disrest, *alias*, indicted in Suffolk County, July, 1916, for the murder of Max Weinstein, at Boston, on June 16, 1916. Thomas J. Grady, Esq., appeared as counsel for the defendant. The defendant was arraigned Oct. 30, 1916, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney Joseph C. Pelletier.

Frank Luciano, indicted in Suffolk County, March, 1916, for the murder of Eugenio Covino, at Boston, on Feb. 14, 1916. He was arraigned March 22, 1916, and pleaded not guilty. John P. Feeney, Esq., P. S. Maher, Esq., Charles J. Martell, Esq., and J. Luciano, Esq., appeared as counsel for the defendant. In June, 1916, the defendant was tried by a jury before Hardy, J. The result was a verdict of guilty of manslaughter. The defendant was thereupon sentenced to State Prison for a term not exceeding twelve years nor less than eight years. The case was in charge of District Attorney Joseph C. Pelletier.

Richard L. McCormick, indicted in Middlesex County, March, 1916, for the murder of Mary A. McCormick, at Cambridge, on March 15, 1916. On March 22, 1916, the defendant was committed to the Bridgewater State Hospital until restored to sanity. The case was in charge of District Attorney William J. Corcoran.

Vincenzo Patrello, *alias*, Matteo Neapolitano, and Joseph Balzarano, indicted in Berkshire County, January, 1916, for the murder of Vincenzo Cresci, at Dalton, on March 27, 1915. The defendants Vincenzo Patrello and Matteo Neapolitano were arraigned Jan. 19, 1916, and each pleaded not guilty. Michael L. Eisner, Esq., appeared as counsel for the defendant Patrello, and Frank H. Cande, Esq., appeared as counsel for the defendant Neapolitano. On July 24, 1916, the defendants retracted their former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendants were sentenced to State Prison for life. The defendant Joseph Balzarano has never been apprehended. The cases were in charge of District Attorney Joseph B. Ely.

Gustav Axel Person, indicted in Norfolk County, September, 1916, for the murder of Anna Person, at Needham, on April 18, 1916. He was arraigned Dec. 6, 1916, and pleaded not guilty. George Granville Darling, Esq.,

was assigned by the court as counsel for the defendant. In December, 1916, the defendant was tried by a jury before Raymond, J. During the progress of the trial the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney Albert F. Barker.

Albert J. Roper, indicted in Middlesex County, March, 1916, for the murder of Albert Roper, at Tewksbury, on March 1, 1916. He was arraigned April 4, 1916, and pleaded not guilty. Charles H. McIntire, Esq., and William H. Wilson, Esq., appeared as counsel for the defendant. In September, 1916, the defendant was tried by a jury before Stevens, J. The result was a verdict of not guilty. The case was in charge of District Attorney William J. Corcoran.

Hormidas Saulnier, indicted in Essex County, January, 1916, for the murder of Henry Willis, at Lawrence, on Oct. 16, 1915. He was arraigned Jan. 17, 1916, and pleaded not guilty. Michael A. Sullivan, Esq., and James J. Sullivan, Esq., appeared as counsel for the defendant. On April 26, 1916, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth and the defendant was sentenced to State Prison for a term not exceeding twelve years nor less than eight years. The case was in charge of District Attorney Louis S. Cox.

Adam Tarzein, indicted in Suffolk County, February, 1916, for the murder of Anna Ostrovick and Belle Ostrovick, on Jan. 17, 1916. He was arraigned March 20, 1916, and pleaded not guilty. J. H. McNally, Esq., and Thomas F. Vahey, Esq., appeared as counsel for the defendant. In May, 1916, the defendant was tried by a jury before Hardy, J. The result was a verdict of guilty of murder in the first degree. The defendant was thereupon sentenced to death

by electrocution during the week beginning Nov. 19, 1916. This sentence was commuted to imprisonment for life. The case was in charge of District Attorney Joseph C. Pelletier.

Frank J. Tracy, *alias*, and Joseph Rogers, *alias*, indicted in Suffolk County, March, 1916, for the murder of Samuel M. Cohen, at Boston, on May 29, 1915. They were arraigned March 21, 1916, and each pleaded not guilty. J. W. Connelly, Esq., appeared as counsel for the defendant Frank J. Tracy, and R. J. Cotter, Esq., appeared as counsel for the defendant Joseph Rogers. In April, 1916, the defendants were tried by a jury before Hardy, J. The result in each case was a verdict of guilty of murder in the second degree. The defendants were thereupon sentenced to State Prison for life. The cases were in charge of District Attorney Joseph C. Pelletier.

Arthur L. Wells, indicted in Franklin County, March, 1916, for the murder of Sarah Hakes, at Greenfield, on Jan. 10, 1916. He was arraigned March 15, 1916, and pleaded not guilty. Frank J. Lawler, Esq., and Timothy M. Hayes, Esq., appeared as counsel for the defendant. Later the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney John H. Schoonmaker.

Quentin Wood, indicted in Suffolk County, January, 1916, for the murder of Rose May, on Dec. 10, 1915. He was arraigned Jan. 24, 1916, and pleaded not guilty. J. P. Feeney, Esq., appeared as counsel for the defendant. On June 28, 1916, the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney Joseph C. Pelletier.

The following indictments for murder are now pending: —

Ralph V. Baker, indicted in Plymouth County, October, 1916, for the murder of William W. Cushing, at Marshfield, on Oct. 3, 1916. R. M. Walsh, Esq., appeared as counsel for the defendant. On Oct. 9, 1916, the defendant was committed to the Bridgewater State Hospital for observation. The case is in charge of District Attorney Frederick G. Katzmann.

Giovanni Boccorossa, indicted in Hampden County, September, 1916, for the murder of Rosie Boccorossa, at Holyoke, on July 3, 1916. He was arraigned Sept. 20, 1916, and pleaded not guilty. James O'Shea, Esq., and Thomas J. Lynch, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Joseph B. Ely.

Edwin D. Carter, indicted in Hampden County, May, 1916, for the murder of Richard F. Lawton, at Russell, on Jan. 11, 1916. He was arraigned May 10, 1916, and pleaded not guilty. Richard P. Stapleton, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Joseph B. Ely.

Frank Coletti, indicted in Norfolk County, April, 1916, for the murder of Josephine M. Coletti, at Quincy, on Jan. 20, 1916. On April 27, 1916, the defendant was committed to the Bridgewater State Hospital for observation. The case is in charge of District Attorney Frederick G. Katzmann.

Harold Craft, indicted in Suffolk County, February, 1916, for the murder of Eilleen T. Kern, at Boston, on Jan. 28, 1916. He was arraigned May 24, 1916, and pleaded not guilty. No further action has been taken in this case. The case is in charge of District Attorney Joseph C. Pelletier.

Salvador Cremona, indicted in Hampshire County, October, 1916, for the murder of Aristides Rodrigues, at Northampton, on Aug. 4, 1916. He was arraigned Oct. 23, 1916, and pleaded not guilty. George P. O'Donnell, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney John H. Schoonmaker.

Richard Dadah, *alias*, indicted in Hampden County, December, 1916, for the murder of Mahomet Derbas Hazardine, at Springfield, on Oct. 14, 1916. He was arraigned Dec. 29, 1916, and pleaded not guilty. William H. McClintock, Esq., and James E. Dunleavy, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Joseph B. Ely.

Francis Ducharme, indicted in Hampden County, December, 1916, for the murder of Ellen Kaczor, at Chicopee, on Oct. 21, 1916. He was arraigned Dec. 29, 1916, and pleaded not guilty. N. Seelye Hitchcock, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Joseph B. Ely.

Hassan Durpast, *alias*, indicted in Hampden County, December, 1916, for the murder of Sarkus Dadah, at Springfield, on Oct. 14, 1916. He was arraigned Dec. 29, 1916, and pleaded not guilty. William G. McKechnie, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Joseph B. Ely.

Manuel Santos Ferreira, indicted in Plymouth County, October, 1916, for the murder of Jose Domingo Coutinho, at Middleborough, on Aug. 16, 1916. He was arraigned Oct. 25, 1916, and pleaded not guilty. W. M. Alston, Esq., appeared as counsel for the defendant. No further action

has been taken in this case. The case is in charge of District Attorney Frederick G. Katzmann.

Emma Gianusso, *alias*, indicted in Hampden County, May, 1916, for the murder of Frank Daniels, Jr., at Ludlow, on March 11, 1916. She was arraigned May 10, 1916, and pleaded not guilty. E. A. McClintock, Esq., and D. B. Hoar, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Joseph B. Ely.

John Gilstrap, indicted in Suffolk County, October, 1916, for the murder of Albert Newton, at Boston, on Sept. 11, 1916. The defendant has not yet been arraigned. The case is in charge of District Attorney Joseph C. Pelletier.

Michael Glasheen, *alias*, indicted in Berkshire County, January, 1916, for the murder of Lafayette L. Battelle, at Monterey, on Dec. 13, 1915. He was arraigned April 24, 1916, and pleaded not guilty. Patrick J. Moore, Esq., and John S. Stone, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Joseph B. Ely.

John J. Herrick, indicted in Essex County, September, 1916, for the murder of Mabel Leary, at Gloucester, on Sept. 2, 1916. He was arraigned Sept. 27, 1916, and pleaded not guilty. No further action has been taken in this case. The case is in charge of District Attorney Louis S. Cox.

Harry Hinds, indicted in Middlesex County, June, 1915, for the murder of Marvil Elizabeth Hinds and Barbara Jesstena Hinds, at Cambridge, on April 9, 1915. He was arraigned June 24, 1915, and pleaded not guilty. William H. Lewis, Esq., and Isidore H. Fox, Esq., appeared as counsel for the defendant. In November, 1915, the defendant was tried by a jury before Raymond, J. The result was a verdict of guilty of murder in the first degree. Two

motions for a new trial filed by the defendant are now pending. The case is in charge of District Attorney Nathan A. Tufts.

Charles H. Hunnewell, indicted in Middlesex County, September, 1916, for the murder of Alexander Bryan, at Somerville, on July 3, 1916. He was arraigned Oct. 10, 1916, and pleaded not guilty. On Nov. 23, 1916, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth. The defendant has not yet been sentenced. The case is in charge of District Attorney Nathan A. Tufts.

Michael Lopio, indicted in Essex County, September, 1916, for the murder of James Germono, at Salem, on Aug. 15, 1916. He was arraigned Sept. 28, 1916, and pleaded not guilty. No further action has been taken in this case. The case is in charge of District Attorney Louis S. Cox.

Michael Manning, indicted in Essex County, September, 1916, for the murder of Lizzie Manning, at Lawrence, on Aug. 23, 1916. He was arraigned Sept. 18, 1916, and pleaded not guilty. John P. Kane, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Louis S. Cox.

Daniel Manzeiu, indicted in Essex County, September, 1916, for the murder of Yousefka Manzeiu, at Peabody, on Aug. 28, 1916. Sept. 16, 1916, the defendant was committed to the Danvers State Hospital for observation. The case is in charge of District Attorney Louis S. Cox.

Andrew Nelson, indicted in Suffolk County, November, 1916, for the murder of Carrie Baer, on Oct. 24, 1916. He was arraigned Nov. 16, 1916, and pleaded not guilty. Francis F. Harrington, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Joseph C. Pelletier.

Irving E. Olmstead, indicted in Suffolk County, April, 1916, for the murder of Violet C. Mooers, at Boston, on March 13, 1916. He was arraigned April 11, 1916, and pleaded not guilty. Harvey H. Pratt, Esq., and J. A. Tirrell, Esq., appeared as counsel. On Nov. 10, 1916, the defendant was committed to the Psychopathic Hospital and later to the Danvers State Hospital, for observation. The case is in charge of District Attorney Joseph C. Pelletier.

Oscar F. Russ, indicted in Suffolk County, September, 1915, for the murder of Emily Russ, at Boston, Aug. 23, 1915. He was arraigned Oct. 8, 1915, and pleaded not guilty. Thomas F. Vahey, Esq., appeared as counsel for the defendant. In February, 1916, the defendant was tried by a jury before Sisk, J. The result was a verdict of guilty of murder in the second degree. The defendant's bill of exceptions is pending. The case is in charge of District Attorney Joseph C. Pelletier.

Theodore Semon, indicted in Suffolk County, November, 1915, for the murder of Johanna E. Donovan, at Boston, on Oct. 7, 1915. The defendant has not yet been arraigned. William J. Miller, Esq., and David Mancovitz, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Joseph C. Pelletier.

Stelianos Zacharachi, *alias*, indicted in Suffolk County, September, 1916, for the murder of Charles W. Craney, at Boston, Aug. 28, 1916. The defendant has not yet been arraigned. The case is in charge of District Attorney Joseph C. Pelletier.

Grade Crossings.

The following is the report of the work done in connection with the elimination of grade crossings during the year 1916: —

Six hearings before commissions and auditors have been attended.

No work of construction has been done during the year.

Statements of expenditures, numbering 11, amounting to $52,515.85, have been examined, and objection to items amounting to $26,388.24 has been made, $5,079.52 of which has been withdrawn, and decisions as to the balance are pending.

A summary of the statement of expenditures examined in the period 1909 to date is as follows: —

Number of statements,	311
Total amount,	$12,858,512 03
Amount of items objected to,	1,069,692 74
Amounts disallowed or withdrawn,	442,107 94
Amount of items to which objection has been made and decisions are pending,	411,473 44

Savings Bank Investments.

A situation has come to my attention which indicates the necessity of further legislation to protect the assets of savings banks in this Commonwealth.

St. 1908, c. 590, limits and defines the investments which savings banks may legally make, and authorizes savings banks to invest in bonds and notes of Massachusetts railroads which have paid in dividends in cash an amount equal to not less than 4 per cent. per annum on all the outstanding stock for the five years next preceding the investing. This provision was, obviously, enacted to restrict the investments of savings banks to bonds and notes of successful railroads. Nevertheless, I have learned that during the year 1912 notes of the Hampden Railroad Corporation, a corporation which has never become a railroad in fact, were acquired by savings banks in this Commonwealth to the amount of nearly $1,000,000. At the time of the issuance of substantially all of these notes the Hampden Railroad Corporation had no capital stock lawfully issued, and its only substantial assets were represented by certain construction work which had been paid for with borrowed money, together with certain borrowed money in its treasury.

It is not by any means clear that under the provisions of the laws pertaining to savings banks these notes were legal

investments for savings banks. It is claimed, and I understand it to be the opinion of the Bank Commissioner, that these notes were a legal investment, as coming under the provisions of St. 1908, c. 590, § 68, cl. 8, *b*, as amended by St. 1909, c. 491, which authorizes savings banks to take notes of Massachusetts corporations with one or more substantial indorsers, provided that no such loan shall be made or renewed unless within eighteen months next preceding the making or renewing of such loan an examination of the affairs, assets and liabilities of the borrowing corporation or association has been made, at the expense of such borrowing corporation or association, by an accountant approved by the Commissioner.

On Jan. 1, 1912, a report of such an examination of the Hampden Railroad Corporation was made by the New England Audit Company, which stated that the total assets of the Hampden Railroad Corporation were $2,403,017.04, and the total liabilities were the same. The report of the New England Audit Company set forth that said liabilities included liability for common stock to the amount of $1,400,000. Stock at that time could not, under the law, have been issued, as no approval of any issue had been made by the Board of Railroad Commissioners. Therefore, to put it mildly, the statement was inaccurate, since it set forth a liability of $1,400,000, which would constitute a claim against the assets only after the other liabilities had been satisfied, when in fact the money received for said alleged issue of stock created a debt of the railroad to that amount.

The only indorser to most of the notes issued to savings banks was the Hampden Investment Company, the incorporators of which were all persons who were incorporators of the Hampden Railroad Corporation. This corporation was organized on Aug. 24, 1911. The purpose for which it was organized was to transact any business that may be done by a corporation organized under St. 1903, c. 437, and acts in amendment thereof and in addition thereto. The only real purpose for its incorporation seems to have been to facilitate the financing of the Hampden Railroad Corporation and to provide a purchaser of its stock and an indorser

of its paper. The only amount of stock issued and paid for in the Hampden Investment Company was $7,000.

I am informed that before loaning $1,400,000 to the Investment Company with which to pay for the entire authorized capital stock of the Hampden Railroad Corporation, 14,000 shares, the bankers from whom the loan was made stipulated that these shares should be deposited by the Investment Company with them as collateral for the loan, and that $200,000 should be paid into the corporation in addition to the capital stock of $7,000, in order that the corporation should have $200,000 cash resources in addition to the $7,000 paid into it on account of its capital stock. I have no knowledge of where this $200,000 came from, or whether it was a *bona fide* contribution to the Hampden Investment Company. In any event, in its certificate of condition filed Oct. 3, 1912, it is represented as surplus in the corporation. On Jan. 1, 1913, a note of the Hampden Railroad Corporation for $200,000 was given to the Hampden Investment Company, and the $200,000 paid in, under the stipulation above referred to, was paid out by the Hampden Investment Company for some purpose not entirely clear; and thereafter a note of $200,000 was carried as an asset of the Hampden Investment Company until in its certificate of condition for 1916 it disappeared as an asset of the company.

The Hampden Investment Company was used as the "substantial" indorser of the larger amount of the notes taken by the savings banks.

At the time of all of these indorsements the liabilities of the Hampden Investment Company, exclusive of liability for its capital stock, amounted to $1,400,000 or more, and its return of 1912 shows that its entire assets, in addition to the amounts received for the sale of its capital stock and the $200,000 above referred to, plus $2,040.41, which seems to have been accrued interest thereon, consisted entirely of the entire capital stock of the Hampden Railroad Corporation, estimated at $1,400,000.

It follows, therefore, considering the situation in its best light, that when some of the notes given to the savings

banks were indorsed by it, its liability upon these notes and its direct liabilities amounted to over $2,000,000, with but $209,040.41, exclusive of the capital stock of the Hampden Railroad Corporation, to meet these liabilities.

Substantially all these notes, or renewals thereof, remain unpaid. There is, in my judgment, no hope of their being paid by the Hampden Railroad Corporation, unless by authority of the Public Service Commission sufficient bonds are issued and sold to take care of them, or some arrangement is made by which the Hampden Railroad Corporation is made a physical part of some other railroad, and that railroad assumes the liabilities of the Hampden Railroad Corporation.

If the reasonable cost of the construction of the Hampden railroad was less than its outstanding indebtedness, any provision to take care of this indebtedness creates a situation which the provisions of law relating to stock watering were designed to prevent.

There is some doubt in my mind as to whether railroad companies are included in the corporations referred to in that part of said section 68, clause 8, subdivision *b*, providing that corporations whose notes are indorsed by a substantial indorser may be used as an investment by savings banks. There is much more serious doubt in my mind as to whether the Hampden Investment Company, in the condition it was at the time of the indorsement of said notes, was a substantial indorser of notes of hundreds of thousands of dollars. Furthermore, from my present knowledge of the situation it is not entirely clear to me but that a question might be raised as to the legality of these indorsements.

However that may be, the Bank Commissioner is, I understand, of the opinion that these notes were legal investments.

The provisions of law now require a report of the examination of the accountant, above referred to, in such form as the Bank Commissioner shall require, to be made to the bank before the loan is made, and also provide that within thirty days after the completion of the examination a cer-

tified copy of the report shall be delivered by the accountant to the Bank Commissioner.

Under the law as it now exists a bank may legally make a loan although such loan is not approved by the Commissioner, and although he may be of the opinion that the corporation is not in a sound financial condition.

In view of the fact that all the funds of savings banks are held exclusively for the benefit and security of the depositors, it seems imperative that further legislation be enacted to make a recurrence of such a situation impossible.

I suggest the advisability of providing by law that no such loan shall be legal unless it meets with the approval of the Bank Commissioner, or at least he certifies that the corporation proposing to make the loan is in a sound financial condition and is engaged in a profitable business.

I also recommend a consideration of the advisability of restricting the issuance by railroad corporations of notes or other evidences of indebtedness payable within a year for construction purposes.

St. 1908, c. 590, § 8, provides —

> If, in the opinion of the commissioner, such bank or its officers or trustees have violated any law relative thereto, he shall forthwith report such violation to the attorney-general, who shall forthwith, in behalf of the commonwealth, institute a prosecution therefor. If, in the opinion of the commissioner, such bank is conducting any part of its business in an unsafe or unauthorized manner, he shall direct in writing that such unsafe or unauthorized practice shall be discontinued; and if any such bank shall refuse or neglect to comply with any such direction of the commissioner, or if, in the opinion of the commissioner, a trustee or officer of such bank has abused his trust, or has used his official position in a manner contrary to the interests of such bank or its depositors, the commissioner shall, in the case of a savings bank, forthwith report the facts to the attorney-general, who may, after granting a hearing to said savings bank, trustee or officer, institute proceedings in the supreme judicial court, which shall have jurisdiction in equity of such proceedings, for the removal of one or more of the trustees or officers, or of such other proceedings as the case may require; . . .

Until the Bank Commissioner reports to the Attorney-General, as therein provided, this department, obviously, is not authorized to act under this section.

I deem it desirable, and so recommend, that provision be made that where facts come to the attention of the Attorney-General, which in his judgment warrant proceedings under this section, he may act of his own initiative under the provisions thereof.

Combinations to control Prices.

The recent advance in the cost of necessaries of life has caused this department, so far as it was able, to ascertain whether complaints in the Commonwealth as to prices charged for such necessaries were based upon facts which warranted prosecutions.

There is a general impression that all agreements among dealers to fix the prices at which commodities shall be sold are criminal acts under the law of the Commonwealth.

Undoubtedly this impression has arisen from the definition of the crime of conspiracy as given by most textbook writers of the criminal law; that is, that a criminal conspiracy is a combination between two or more persons to do an unlawful thing, or to do a lawful thing by unlawful means. A careful consideration of the law seems to indicate that this definition is too broad. As was said by Shaw, C.J.: —

> But yet it is clear that it is not every combination to do unlawful acts to the prejudice of another by a concerted action which is punishable as conspiracy.[1]

Agreements in unreasonable restraint of trade, at the common law, were voidable by any of the parties thereto. They were not necessarily unlawful in the sense of being criminal or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply unenforceable.[2] Not every agreement to do an act which is unlawful in the sense that the agreement will not be enforced by the courts, on the ground of its being contrary to public policy, is criminal. True, an agreement to do an act in itself criminal is always a criminal conspiracy. Beyond this, agreements to do certain other acts are criminal which if done by

[1] Commonwealth *v.* Hunt, 4 Met. 111, 124; Rex *v.* Turner, 13 East. 228.

[2] Addlyston Pipe & Steel Co. *v.* United States, 85 Fed. 271 (affirmed 175 U. S. 211); Mogul Steamship Co. *v.* McGregor, L. R. 1892, App. Cas. 25; Urnston *v.* Whitelegg Bros., 63 L. T. Rep. 455 (n. s.).

one would not be criminal. These are usually confederacies wrongfully to prejudice another in his property, his person or his character.

It is to be observed that not all agreements to fix prices, although they have a tendency to restrain trade, are invalid, and such agreements, when relating to articles not of prime necessity or of common use, have been held to be valid contracts in this Commonwealth and enforceable by the parties thereto.[1] Obviously, such agreements are not criminal.

In certain cases in some of the States and Canada it has been held that agreements to control the prices of necessaries of life are not criminal unless a monopoly is in fact thereby created.[2]

While no criminal case has arisen in this Commonwealth which presents this precise question, the views of the court in the case of *Commonwealth* v. *North Shore Ice Delivery Co.*, 220 Mass. 55, incline me to the opinion that the law in this Commonwealth is probably the same.

There are expressions in some of the cases in other jurisdictions tending to a contrary view, but it is interesting to find, upon examination, that these cases arose in States where statutes have been passed extending the common law principles as to conspiracies.[3] Other instances of such expressions appear in civil cases, which of course are not controlling.

In a number of States in the Union statutes have been passed making such agreements and confederacies in restraint of trade criminal acts, and of course this is true under the provisions of the so-called Sherman act in relation to interstate transactions. Illustrations of this are found in the statutes of the States of Illinois, Ohio and New York.[4] It is to be observed that the Sherman act has no application to intrastate transactions.

Although several statutes have been enacted in this Com-

[1] Central Shade Roller Co. *v.* Cushman, 143 Mass. 353; Gloucester Glue Co. *v.* Russia Cement Co., 154 Mass. 92; Gamewell Fire Alarm Telegraph Co. *v.* Crane, 160 Mass. 50.

[2] Herriman *v.* Menzies, 115 Cal. 16; Ontario Salt Co. *v.* Merchant Salt Co., 18 Grant (U. C., 540; State *v.* Eastern Coal Co., 29 R. I. 254.

[3] Chicago, etc., Coal Co. *v.* People, 214 Ill. 421; People *v.* Sheldon, 139 N. Y. 251.

[4] Ill. Stats. Ann. § 3550; Ohio Gen. Code, §§ 6390-6402; Cons. Laws of N. Y., c. 20, art. 22.

monwealth with reference to this subject-matter, they by no means cover the situation now under consideration.

R. L. c. 56, § 1, prohibits a vendor from making it a condition of the sale of goods that the purchaser shall not deal in the goods of another.

St. 1907, c. 469, contains a similar provision in regard to the sale, lease or use of tools or machinery.

St. 1908, c. 454, forbids combinations in violation of the common law in three stated particulars, namely, in that a monopoly in articles in common use is or may be created or maintained; in that competition in the supply or price of any such article is or may be restrained or prevented; or in that, for the purpose of establishing a monopoly in such article, the free pursuit of any lawful business is or may be restrained or prevented. As interpreted by the court in the case of *Commonwealth* v. *North Shore Ice Delivery Co.*, 220 Mass. 55, this statute created no new offence but only specified certain kinds of combinations in violation of the common law that might be restrained under the provisions of the act. The court in this case apparently limits the effect of this statute to cases where a monopoly is in fact created, or to cases where the opportunity of competition by persons outside of the combination is restricted. It should be noted, also, that this statute provides no penalty for its violation.

St. 1911, c. 503, provides for a new form of procedure in cases within the purview of St. 1908, c. 454, but creates no new offence.

St. 1912, c. 651, makes unlawful all combinations for the purpose of destroying the trade or business of persons engaged in selling goods and for the purpose of creating a monopoly. As both purposes are stated conjunctively in the statute, it seems to require proof of both, and therefore is inapplicable to ordinary combinations to fix prices.

St. 1913, c. 709, provides only for procedure in case of a violation of law in regard to this matter but creates no new offence.

I suggest the advisability of a statute which will make it a criminal offence to enter into such agreements to fix prices

of commodities of prime necessity or in common use, as may be deemed expedient, and also to extend the principles of the Sherman act to intrastate transactions.

Corrupt Practices in Elections.

Under the provisions of the statutes relating to corrupt practices, if it appears to the Secretary of the Commonwealth that any statement filed thereunder discloses any violations of the provisions of law relating to corrupt practices he shall notify the Attorney-General thereof, and shall furnish him with copies of all papers relating thereto, and the Attorney-General within two months thereafter shall examine every such case, and if he is satisfied there is cause, he shall, in the name of the Commonwealth, institute appropriate civil proceedings or refer the case to the proper district attorney for such action as may be appropriate in the criminal courts. St. 1913, c. 835, § 366, provides that action to compel the filing of statement in compliance with it shall be begun within sixty days after such election.

In view of the great number of returns and the short time given to the Secretary of the Commonwealth for examination, irregularities and failures to comply with law are frequently not brought to the attention of this department until after the time has expired in which action may be begun. It is difficult for the Secretary of the Commonwealth to bring all instances of irregularity or failure to comply with law in these cases to the attention of the Attorney-General, in any event until the time for action by the Attorney-General has nearly expired.

I recommend that the time allowed for proceedings be extended.

Under the law as it now stands five or more voters may bring an election petition in equity to investigate the election of any candidate. In such proceeding it is provided that a witness who testifies therein shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any matter or thing concerning which he may so testify, except for perjury committed in such testimony. Criminal prosecutions by the district attorney may often be barred

by such proceedings, where, if no such proceeding had been instituted, a conviction for the violation of law might have been obtained. I am of the opinion that some provision should be made so that such proceedings shall not be had or shall be suspended when the court is of the opinion, upon representation of the district attorney, that the proceedings may obstruct the course of public justice.

During the year my attention has been called to expenditures made directly by individuals in the furtherance of the candidacy of others or the defeat of candidates for office. It was claimed that such action was not a violation of law so long as the expenses incurred were for purposes defined in St. 1913, c. 835, § 349, as amended by St. 1914, c. 783, § 3, as personal expenses, and so long as they were incidental to the rendering of services as a speaker, publisher, editor, writer or other person enumerated in St. 1913, c. 835, § 361, as amended. After careful consideration of the matter I came to the conclusion that this construction was correct, as otherwise, in my judgment, there would be grave doubt as to the constitutionality of said section 361. If it is desired that such expenditures be limited beyond the limitations imposed by said section 349, that intention should be made manifest by the Legislature.

I also recommend that the act be revised in conformity with the decision of the Supreme Judicial Court in the case of *Dinan* v. *Swig*, 223 Mass. 516, and so as to make it consistent with the Federal statutes relating to corrupt practices in elections.

Boston & Maine Reorganization.

I feel it my duty to bring to the attention of the Legislature the situation in which the Commonwealth may be placed by the proposed reorganization of the Boston & Maine Railroad. Undoubtedly every member of the Legislature is aware of the receivership proceedings now pending in the United States District Court, and of the possibility that the appointment of the receiver will be made permanent, as well as the fact that the current earnings of the road appear as the largest in its history.

Apparently one of the results of the appointment of a permanent receiver will be to make it possible to avoid certain of the leases of other roads now held by the Boston & Maine, or to force a reduction of the agreed rentals, or a consolidation of such lines with the Boston & Maine. The Legislature of 1915, by the enactment of chapter 380 of the Special Acts of that year, seems to have sanctioned some such action.

It is my duty, however, clearly to point out that the Federal receivership will make it possible to avoid *all* contracts of the Boston & Maine Railroad to which it is a party as readily as its agreements with the leased lines. The Commonwealth holds certain obligations of the Boston & Maine Railroad. Its rights may be abrogated by the same receivership proceedings, and the favor granted by it by virtue of said act may be used for the cancellation of its contract rights.

The Commonwealth owns $5,400,000 of the bonds of the Boston & Maine Railroad which were issued to it in payment for the common stock of the Fitchburg Railroad, owned by the Commonwealth.

Prior to the construction of Commonwealth Pier in South Boston, on which the State has spent over $4,000,000, a contract was made with the Boston & Maine Railroad and the New York, New Haven & Hartford Railroad Company, guaranteeing that these roads would make their flat Boston rates apply to the pier when constructed; or, stated in another form, guaranteeing that the rates to the piers constructed by the Commonwealth would be the same as to piers owned by the railroads themselves. In the opinion of the then chairman of the Directors of the Port of Boston such a rate arrangement was absolutely a necessary prerequisite to the construction of such piers by the State. No steps toward the expenditure of the large sums which were involved were taken until the agreement was made. In the opinion of all public officials who have considered the matter, so far as I am aware, the value of the piers in South Boston will be enormously impaired if such arrangement is abrogated. Steamship lines cannot be expected to make

use of the piers unless they are assured an equality in railroad rates with steamship lines using the piers owned by the railroads.

Very likely other contracts with the Commonwealth exist which may be similarly affected.

I submit to the consideration of this Legislature whether it desires to release the Boston & Maine Railroad or its successors from these obligations to the Commonwealth. If it does not, the opportunity to protect the Commonwealth will hardly be open after the privileges granted by chapter 380 of the Special Acts of 1915 have been availed of.

There are some phrases interspersed in that act which it might be argued furnish some protection to the Commonwealth. In my opinion, however, in order to secure full protection of the obligations to the State, the grant of the privileges contained in said act should be made conditional upon the performance of the present contracts of the Boston & Maine Railroad with the Commonwealth, and I recommend legislation to that end. Furthermore I advise that the grant of any further privilege to the New York, New Haven & Hartford Railroad be conditioned upon terms that will secure to the Commonwealth the advantages contemplated by said contract.

Bonds of Trustees and Receivers.

My attention has been called by the Chief Justice of the Supreme Judicial Court to the fact that there is no provision of law determining to whom a bond should run given by a trustee appointed by the Supreme Judicial Court or the Superior Court under the provisions of sections 5 and 6 of chapter 147 of the Revised Laws. In the Probate Court the forms adopted and approved by the Supreme Judicial Court provide that such bond shall run to the judge of probate, like all other probate bonds. The absence of any provision in case the appointment is made by the Supreme Judicial Court or the Superior Court has given rise to some embarrassment. I also find that there is no provision of

law as to whom a bond should run given by a receiver appointed by the Supreme Judicial Court or the Superior Court. It appears to be the custom in the Supreme Judicial Court for such bonds to run to the Commonwealth, and in the Superior Court, to the Treasurer and Receiver-General. It seems to me in all these cases there should be a uniform practice established by law. Accordingly, I recommend the enactment of legislation to the effect that, in all cases where bonds are required to be given in connection with court proceedings other than in the Probate Court, and where there is no other provision of law determining the form of the bonds, such bonds should run to the Commonwealth, with appropriate provision for the bringing of suit upon such bonds, with the approval of the court, by any person injured by a breach.

Public Administrators.

Under the provisions of section 12 of chapter 138 of the Revised Laws, when an estate has been fully administered by a public administrator he is required to deposit the balance of such estate with the Treasurer and Receiver-General, if no heirs appear who are entitled to the same. Section 14 provides that at any time within six years after such deposit any person legally entitled to this fund may file in the Probate Court a petition for administration. If this petition is granted the fund is paid over by the Treasurer and Receiver-General to the new administrator, who administers it for the benefit of the parties interested. This section provides that upon such a petition notice shall be served upon a public administrator of the county, "who shall appear in behalf of the Commonwealth." Under this provision it becomes the duty of the public administrator to defend, if a defence is required, any such claims. The statute, however, makes no provision for the compensation of a public administrator for such services. It is the practice, when he is unsuccessful in his defence and the petition is allowed, for the Probate Court to require the new administrator to compensate the public administrator for such services out of the fund. Where, however, the public administrator is successful in his

defence, there is no way in which he may be compensated out of the fund, and, accordingly, if he is to receive compensation, he must be paid by the Attorney-General out of his appropriation. As all such defences are really made in behalf of any persons who may thereafter become entitled to the fund, it would seem that the fund itself should be charged with all such expenses. I therefore recommend legislation authorizing the judge of the Probate Court, in all cases where a public administrator appears upon such petitions, to enter a decree for the payment of his compensation out of the fund in the hands of the Treasurer and Receiver-General, and authorizing that official to make payments upon such decrees.

It not infrequently happens, shortly after a public administrator has settled his account and turned over the balance in his hands to the Treasurer and Receiver-General, that persons will be discovered who are undoubtedly heirs of the deceased and entitled to the fund. Particularly in cases where the balance is small, it is a hardship to require such persons to go through the form of proceedings required by section 14 above mentioned, but under our present law the Treasurer and Receiver-General is authorized to pay out the fund only upon a decree entered after such proceedings. I suggest legislation authorizing the judge of the Probate Court, upon application of a public administrator, to reopen his account after an estate has thus been closed, and to enter a decree requiring the Treasurer and Receiver-General to return the fund so deposited to the public administrator, to be administered by him according to law.

Land Court. — Report of Cases. — Jurisdiction.

In a recent case the Supreme Judicial Court has held that the Land Court has not yet been given by the Legislature the power, given to the Superior Court in 1910, to report for decision by the Supreme Court important questions of law arising in the course of a proceeding, unless the case has been so far disposed of that it is in shape for entry of final decree. *Riverbank Improvement Co.* v. *Chapman*, 224 Mass. 424.)

Questions of law frequently arise in the course of legal proceedings, the settlement of which may save the trouble and expense incident to a lengthy trial and furnish a guide to other possible litigants who stand in a similar situation.

The exact case mentioned above, in which an adverse decision was rendered, shows most aptly the injustice which may result from such a state of the law, and the need for legislation to remedy the situation. Chapter 112 of the General Acts of 1915 permits the Land Court to register the title of land which has been made subject to restrictions in cases where the restrictions would no longer be specifically enforced in equity, and in place thereof damages would be allowed for a breach of the restriction. Procedure is established for the determination of the damages by a jury in the Superior Court, and payment of the amount thereof by the petitioner into court, whereupon the Land Court may register the title free and clear of the restrictions.

Such a petition was presented to the Land Court, but at the outset it was indicated that the adjoining landowners, who objected to the registration, claimed that this statute was unconstitutional. Obviously, here was an important point of law which went to the very root of the litigation. If the contention should prove correct, it would nullify all action which might be taken. A trial of the question of the amount of damages to the other property in the neighborhood from an abolition of the restriction would take much time, involve heavy expense to the parties and to the county and would go for naught if ultimately the statute should be decided to be unconstitutional. In addition, the petitioner would be required to raise the amount of money fixed by the verdict of the jury and pay it into court, losing the use thereof during the period of time until the question had been decided by the Supreme Court.

Nevertheless, as the law now stands there seems no method of avoiding such an unfortunate situation.

Accordingly I recommend that the Legislature enact a law specifically granting to the Land Court the power to report questions of law arising upon any interlocutory order or decree. This might be accomplished by amending the last

sentence of R. L., c. 128, § 13, as amended by St. 1902, c. 458, and St. 1910, c. 560, § 1, by inserting after the word "any" and before the word "decision" the words "interlocutory or final;" and by making the same amendment of St. 1904, c. 448, § 8, as amended by St. 1910, c. 560, § 6.

Another recent decision of the Supreme Judicial Court raises the question of whether the jurisdiction of the Land Court might not well be extended. (*Sederquist* v. *Brown*, 225 Mass. 217.) In that case it was held that where there exists a special attachment of real estate standing in the name of the petitioner but claimed to be the property of another who is the defendant in a pending suit, the Land Court has no right to determine the justice of the attachment, and can only register the land subject thereto. Obviously, in cases where there is no foundation for the claim that the petitioner for registration is not the real owner of the property, this may work an injustice. Accordingly I recommend consideration by the Legislature of the advisability of broadening the jurisdiction of the Land Court to establish an absolute title upon petition to register title to land.

Insurance.

R. L., c. 6, § 42, provides: "No board or officer shall insure any property of the commonwealth without special authority of law."

The general policy thereby established is sound. The property of the Commonwealth is so extensive and so widely separated that it is better business for the Commonwealth, in ordinary cases, to act as its own insurer than to pay insurance premiums, a substantial percentage of which is absorbed by the expenses of the company.

It is, however, the practice in nearly all building contracts to require the contractor to agree to furnish to the Commonwealth a building fully completed according to the plans and specifications. In other words, to throw the risk of loss during construction upon the contractor. As a practical matter this results in the contractor effecting insurance upon the building during construction, and it is fair to assume that the cost of such insurance is figured by him in

determining the amount of his bid. In view of this situation it has frequently been specified in times past that the contractor should furnish such insurance and make the same payable to the Commonwealth. Inasmuch as nearly all contracts call for the payment monthly to the contractor of from 85 to 95 per cent. of the value of the work done, the Commonwealth stands a risk of loss in the event of fire, followed by insolvency of the contractor, unless there is such a provision making the insurance payable to the Commonwealth. Practically, therefore, the Commonwealth generally pays for such insurance during construction as a part of the contract price of the work, and consequently it would seem to be desirable that it have the full benefit of the insurance obtained by making the policies payable to the Commonwealth in case of loss. If this is to be so, the law should be in such shape that no possible question could be raised as to the legality of such insurance or the propriety of having the policies payable to the Commonwealth.

Accordingly I would recommend the amendment of said section by the insertion after the word "commonwealth" of the words "except buildings under construction, alteration or repair."

Sentences to the Massachusetts Reformatory and Reformatory for Women.

I renew my recommendation, made in the report of the Attorney-General for the year 1915, that legislation be enacted clearly defining what crimes and offences may be punished by imprisonment in the reformatory prisons, together with the limitation of punishment.

Upon this recommendation a bill was reported last year by the committee on the judiciary, but failed to pass the House of Representatives by reason of what I believe to be a misunderstanding upon the part of the members. I have been informed that the members of the House were of the impression that the proposed bill added offences to those which already were punishable at the reformatories, and in some instances increased the penalty for such offences. The bill in fact had the opposite result, as it prohibited sentences to the

reformatories in many cases now executed therein, and in no instance included offences that are not now punishable therein or increased the penalty that may now be imposed in relation to an offence but, on the other hand, restricted the length of sentence in many instances to a shorter period than now is imposed by the courts.

Retirement of Veterans of the Civil War.

St. 1907, c. 458, § 1, as amended by Gen. St. 1915, c. 95, provides that veterans of the Civil War in the service of the Commonwealth, if incapacitated for actual duty, shall be retired from active service, with the consent of the Governor, at one-half of the rate of compensation paid to them when in the active service, provided they have been in the service of the Commonwealth at least ten years. Instances have occurred where veterans have, by reason of an act of the Legislature or other reasons, and through no fault of their own, ceased to be in the service of the Commonwealth before they made application to be retired under the provisions of this act. The result has been that they could not be retired, for the reason that at the time of their application for retirement they were not in the service of the Commonwealth.

I recommend that said section be amended by providing that a veteran who shall be deemed to be incapacitated for active service, who has been in the service of the Commonwealth at least ten years, shall be entitled to the benefits of the act, notwithstanding the fact that at the time of his application he has ceased to be an employee of the Commonwealth.

Publication of the Opinions of the Attorney-General.

I recommend that the sum of $3,800 be appropriated for the purpose of continuing the publication of the opinions of the Attorneys-General, there now being, in my judgment, a sufficient number of public interest to warrant the publication of Volume IV.

Department of the Attorney-General.

The number of official opinions rendered by the department during the year, up to Jan. 1, 1917, was 188. The number of cases tried in the Probate Court was 30. The number of cases tried in the Superior Court was 17, of which 3 were before a jury. Twenty-eight hearings before a single justice of the Supreme Judicial Court have been attended, and there have been 16 cases argued before the Supreme Judicial Court. There has been 1 case argued before the United States Supreme Court and 1 case before the United States District Court for the District of Massachusetts. In addition, there has been 1 case argued before the Interstate Commerce Commission at Washington, and there have been 7 hearings before the Industrial Accident Board of Massachusetts.

The collections of the department amounted to $412,659.56.

Annexed to this report are such of the opinions rendered during the current year as it is thought may be of interest to the public.

Respectfully submitted,

HENRY C. ATTWILL,
Attorney-General.

OPINIONS.

Interest on Taxes.

Under Gen. St. 1915, c. 237, § 21, interest may be collected at the rate of 6 per cent. on all taxes unpaid after November 1, where no action has been taken upon the subject by the town.

JAN. 3, 1916.

Hon. WILLIAM D. T. TREFRY, *Tax Commissioner.*

DEAR SIR: — I beg to acknowledge your request for my opinion as to whether, under the provisions of section 21 of chapter 237 of the General Acts of 1915, interest may be charged upon taxes in cases where no action has been taken upon the subject by the town.

Prior to 1913 the liability of taxpayers to pay interest upon taxes assessed upon them seems to have been conditioned upon a vote of the city, town or district to that effect. St. 1909, c. 490, Part I., § 71. By St. 1913, c. 688, § 1, the section just referred to was amended by substituting the following provision therefor: —

> Taxes shall be payable in every city and town and in every fire, water, watch or improvement district in which the same are assessed, not later than the fifteenth day of October of each year, and on all taxes so assessed remaining unpaid after the first day of November interest shall be paid at the rate of six per cent per annum from the fifteenth day of October until such taxes are paid; but a city, town, fire, water, watch or improvement district may by vote, ordinance or by-law charge interest from an earlier date, and such interest shall be added to and be a part of the taxes.

It is plain that this section expressly provides that interest shall be paid at the rate of 6 per cent. per annum from October 15 upon all taxes remaining unpaid after November 1. By St. 1915, c. 237, § 21, the provision just quoted was amended so as to provide "on all taxes so assessed remaining unpaid after the first day of November interest shall be paid, at a specified rate of not less than six nor more than ten per cent per annum

as such city by its city council or such town or district may vote." In my opinion the only purpose of this amendment was to authorize cities and towns, by express vote, to increase the interest rate from 6 per cent. to any higher rate not in excess of 10 per cent., and in the event that no such action is taken, interest shall be paid at the rate of 6 per cent.

My answer to your question is, therefore, that the town to which you refer may collect interest at the rate of 6 per cent. on all taxes unpaid after November 1.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Reservoirs — Right to take Water from.

In the absence of special circumstances no person has a right to take for his own use water from a reservoir under the charge of the Metropolitan Water and Sewerage Board, without its consent.

JAN. 13, 1916.

Metropolitan Water and Sewerage Board.

GENTLEMEN: — I beg to acknowledge your request for my opinion as to whether individual inhabitants of any city or town within the watershed of any water supply used by your Board are entitled as a matter of right to take water from the reservoirs under your charge for their individual use, under the provisions of sections 25 and 26 of chapter 488 of the Acts of 1895. Those sections are as follows: —

SECTION 25. No person shall take or divert any water of a water supply of any city or town in said water district from any water source, reservoir, conduit or pipe used for supplying such water to, or in any such city or town, or occupy, injure or interfere with any such water, or with any land, building, aqueduct, pipe, drain, conduit, hydrant, machinery or other work or property so used, and no person shall corrupt, render impure, waste or improperly use, any such water.

SECTION 26. The provisions of the preceding section shall not apply to any person in taking or diverting any such water or interfering with or occupying any water, land or works therein described, by permission of said metropolitan water board, or the water board, water commissioners or superintendent of any city or town having charge of the land, water or work; nor to the individual inhabitants of any city or town within the watershed of any water supply used by said metropolitan water board, or by any city or town aforesaid, in

taking from the part of the supply or from the tributaries of the supply within their respective city or town limits so much of the water thereof as they shall need for their ordinary domestic household purposes, for extinguishing fires, or for generating steam.

It will be noted that neither of these sections purports to grant to any one any affirmative legal rights. Section 25 expressly forbids the diverting of any water from any water source, reservoir or pipe. Section 26 is merely a limitation upon the prohibition contained in the previous section. That prohibition does not apply to persons coming within the classes mentioned in section 26. Those persons, however, are not granted any affirmative rights. They are merely permitted to exercise any rights that they already have or thereafter acquire. Thus riparian owners along any stream which is a part of a water supply may continue to exercise their rights to take water from the stream as riparian proprietors to the extent mentioned in section 26. Any other persons who have similar rights to take water from a stream may continue to do so.

As I understand it the reservoirs in charge of your Board are largely or wholly artificial bodies of water, and all the land immediately bordering upon them is owned by the Commonwealth and controlled by your Board. Under such circumstances, in my opinion no persons have any rights as riparian proprietors in these reservoirs, and, therefore, no persons have any legal rights to take water from such reservoirs which are preserved by section 26. It follows that in such cases no one may take water from such a reservoir except by the permission of your Board.

Isolated cases may arise where, by reason of special circumstances, a person owning land near or bordering upon a reservoir may have special rights in it or in streams or bodies of water which were flooded when it was constructed.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Property — Carcass of Deer.

The carcass of a deer, killed under the provisions of St. 1913, c. 529, § 1, as amended by St. 1914, c. 435, by a farmer or other person upon land owned by him, becomes the property of the person so killing, although it cannot be sold by him.

JAN. 14, 1916.

Commissioners on Fisheries and Game.

GENTLEMEN: — You have requested my opinion as to whether the carcass of a deer killed by a farmer or other person upon land owned by him, in accordance with the provisions of St. 1910, c. 545, as amended by St. 1912, c. 388, St. 1913, c. 529, and St. 1914, c. 453, is the property of the farmer killing the deer or the property of the Commonwealth.

The first two statutes named are repealed by St. 1913, c. 529, and are therefore immaterial except as preceding legislation is helpful in the interpretation of that now in effect.

The statute now applicable is St. 1913, c. 529, § 1, as amended by St. 1914, c. 453. It provides as follows: —

It shall be unlawful, except as hereinafter provided, to hunt, pursue, wound or kill a deer, or to sell or offer for sale, or to have in possession for the purpose of sale, a deer or the flesh of a deer captured or killed in this commonwealth: *provided*, that this act shall not apply to a tame deer belonging to any person and kept on his own premises; and *provided, further*, that any farmer or other person may, on land owned or occupied by him, or, with the consent of the owner, upon land adjacent thereto pursue, wound or kill any deer which he has reasonable cause to believe has damaged or is about to damage crops, fruit or ornamental trees, except grass growing on uncultivated land; and he may authorize any member of his family, or any person employed by him so to pursue, wound or kill a deer under the circumstances above specified. In the event of the wounding or killing of a deer as aforesaid, it shall be the duty of the person by whom or under whose direction the deer was wounded or killed to mail or otherwise transmit within twenty-four hours thereafter to the commissioners on fisheries and game a report in writing signed by him of the facts relative to the said wounding or killing. The said report shall state the time and place of the wounding or killing, and the kind of tree or crop injured or destroyed, or about to be injured or destroyed, by the deer. It shall be unlawful to sell or offer for sale the whole or any part of a deer killed under the aforesaid provision.

Apart from statutory provisions, deer and game become the property of the person taking them or reducing them to posses-

sion, and but for the statute in question there could be no doubt but that the farmer killing the deer would acquire title to the carcass.

In my opinion there is nothing in the statutes mentioned which changes the law in this respect. The section quoted makes it unlawful to hunt, kill or sell deer "except as hereinafter provided." One of these provisos is that a farmer, under certain conditions, may kill a deer. There is nothing in the act which provides for a different result following such killing as is permitted from what was prescribed by the law before the enactment of the statute in question. The final sentence, which provides that "it shall be unlawful to sell or offer for sale the whole or any part of a deer killed under the aforesaid provision," seems to imply that the farmer acquires title but is forbidden to dispose of the meat. If title vested in the Commonwealth, inasmuch as the meat cannot be sold it would seem that it must be wasted, and it would require a definite statutory enactment to bring about such a result.

Accordingly, I am of the opinion that under the proviso in said section the carcass of such a deer is the property of the farmer or other person authorized to kill.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Salaries — Unearned cannot be paid from Public Funds.

The payment of a salary by the Massachusetts Agricultural College to the estate of a deceased employee for the period after his death would be an unauthorized expenditure of public funds contrary to R. L., c. 6, § 58.

JAN. 20, 1916.

Mr. KENYON L. BUTTERFIELD, *President, Massachusetts Agricultural College.*

DEAR SIR: — I am in receipt of your letter of the 17th inst. stating that one of the employees of your institution died on Dec. 1, 1915, and requesting my opinion as to the propriety of paying to his estate the amount of his salary for the entire month of December.

Of course if the payment proposed to be made was of money belonging to the Massachusetts Agricultural College as a corporation distinct from the State, there could be no legal objec-

tion to this action, but by St. 1911, c. 311, all property, real or personal, belonging to the Massachusetts Agricultural College, not held by it upon special trusts, vested in the Commonwealth, so that moneys derived from other sources, as well as direct appropriations by the Legislature, are now held by your institution as trustee for the public. The real question, then, is whether public moneys can be expended for this purpose.

There is an implied condition in every contract for personal services that the employee will be able to perform such services, and in case of his death during the contract of employment the employer's liability to pay further compensation or salary is terminated. *Johnson* v. *Walker*, 155 Mass. 253. If such payment is made it would be in the nature of a gratuity.

R. L., c. 6, § 58, dealing with salaries payable from the treasury of the Commonwealth, provides, in part, as follows: —

> . . . No salary shall be paid to any person for a longer period than that during which he has been actually employed in the duties of his office. . . .

This provision was considered by the court in *Lord* v. *County of Essex*, 98 Mass. 484, where it says: —

> It is true that this, like all other statute provisions, may be repealed by the Legislature at any time or in any respect, and that it is not in terms extended to salaries payable out of the county treasury. But it tends to indicate a general policy in such matters; and an intention on the part of the Legislature to depart from so prudent and so just a rule is not to be inferred unless clearly expressed, nor to be more readily presumed when the payment is to be made out of the treasury of a county, than when it is to come directly out of the treasury of the Commonwealth.

For the above reasons I feel compelled to advise that, in my opinion, such a payment as you propose would be an unauthorized expenditure of public funds.

Yours truly,

HENRY C. ATTWILL, *Attorney-General.*

Boston Finance Commission — Authority of.

Under St. 1909, c. 486, § 18, the Boston Finance Commission may investigate expenditures, accounts, etc., of the office of clerk of the Superior Court for Civil Business in Suffolk County.

JAN. 28, 1916.

Boston Finance Commission.

GENTLEMEN: — I beg to acknowledge your request for my opinion as to whether the Boston Finance Commission has the right to investigate any and all matters pertaining to the finances of the office of the clerk of the Superior Court for Civil Business in the County of Suffolk.

St. 1909, c. 486, § 18, provides as follows: —

It shall be the duty of the finance commission from time to time to investigate any and all matters relating to appropriations, loans, expenditures, accounts, and methods of administration affecting the city of Boston or the county of Suffolk, or any department thereof, that may appear to the commission to require investigation, and to report thereon from time to time to the mayor, the city council, the governor, or the general court. The commission shall make an annual report in January of each year to the general court.

It seems to me that this section not only authorizes you but makes it your duty to investigate the expenditures, accounts and methods of administration of the office of the clerk of the Superior Court for Civil Business in the County of Suffolk to the extent that it may appear to your commission that such investigation is required.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Hawkers and Pedlers — Selling of Tags for Charitable Purposes.

The raising of money for charitable purposes by "selling" tags is not a sale of goods, wares and merchandise within the meaning of R. L., c. 65, §§ 13–29, relating to hawkers and pedlers.

FEB. 9, 1916.

THURE HANSON, Esq., *Commissioner of Weights and Measures.*

DEAR SIR: — You recently requested my opinion as to whether the soliciting of money for charitable or similar purposes by the "selling" of tags is a violation of the provisions

of sections 13 to 29 of chapter 65 of the Revised Laws, dealing with hawkers and pedlers.

In my opinion this method of raising funds is not a sale of goods, wares or merchandise within the meaning of section 13 of the chapter to which you refer. Transactions of this sort are not, in legal effect, sales of these tags. They are rather the soliciting of contributions, and the tags are a form of receipt or acknowledgment given to the contributor.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — Eminent Domain — Salisbury Beach.

The power of eminent domain can be exercised only for a public purpose and therefore Senate Document No. 184, entitled "An Act to make Salisbury Beach a public reservation," would be unconstitutional if enacted, since section 10 of this act authorizes the leasing or sale of parts of the land so taken "which are not needed as a public reservation."

FEB. 18, 1916.

Hon. HENRY G. WELLS, *President of the Senate.*

DEAR SIR: — I have the honor to acknowledge a copy of an order passed by the Honorable Senate on Feb. 9, 1916, which is as follows: —

Ordered, That the opinion of the Attorney-General be requested by the Senate upon the constitutionality, if enacted, of the bill, known as Senate Document No. 184, entitled "An Act to make Salisbury Beach a public reservation and to establish the Salisbury Beach Reservation Commission," now under consideration by a committee of the General Court, and that a copy of said bill be transmitted to the Attorney-General by the clerk of the Senate.

Upon examination the proposed bill accompanying this order appears to be identical with chapter 715 of the Acts of 1912. On June 19, 1913, that statute was held to be unconstitutional by the Supreme Judicial Court, on the ground that it was an attempt to authorize the exercise of the right of eminent domain in part for a private use. *Salisbury Land & Improvement Co.* v. *Commonwealth*, 215 Mass. 371. This decision has not been overruled and, so far as I am aware, has never been questioned by the court.

An amendment to the Constitution was adopted by the people at the election in November, 1915, and is now in force in the following form: —

The general court shall have power to authorize the commonwealth to take land and to hold, improve, sub-divide, build upon and sell the same, for the purpose of relieving congestion of population and providing homes for citizens; *provided, however,* that this amendment shall not be deemed to authorize the sale of such land or buildings at less than the cost thereof.

No other change in the Constitution since the decision of the Supreme Judicial Court has been called to my attention which can, by any possibility, have any bearing upon the question submitted by the order of the Senate.

The article of amendment just referred to empowers the General Court to authorize the exercise of the right of eminent domain only "for the purpose of relieving congestion of population and providing homes for citizens." The bill submitted with the order appears to have no such purpose. It is entitled, "An Act to make Salisbury Beach a public reservation and to establish the Salisbury Beach Reservation Commission." Section 4 authorizes the commission created by the bill to acquire, by right of eminent domain, "and thereafter to maintain and make available for the inhabitants of the commonwealth as a public reservation for the use, exercise and recreation of the inhabitants of the commonwealth" certain land particularly described. The proposed bill, therefore, so far as its purpose is a public one, is a bill for the creation of a public reservation or park. No part of its avowed purpose is the relieving of congested population or the providing of homes for citizens. By section 10 the commission is authorized to sell or lease lands taken by it "which are not needed as a public reservation;" but there is no requirement that such sales or leases shall be made to effectuate the purpose stated in this amendment to the Constitution or any other specific purpose.

No conditions have been called to my attention in any of the cities and towns specified in the third section of the proposed bill calling for legislation under this amendment. It is obvious that if such conditions exist it can only be in one or more of the cities mentioned, and not in the various small towns included in the so-called Salisbury Beach Reservation district. I am unable to find any connection between the provisions of the bill and the relief of congestion of population.

In my opinion the proposed bill does not come within the power granted to the General Court by this amendment to the Constitution, and, therefore, if enacted, would be unconstitutional upon the grounds stated by the Supreme Judicial Court in declaring unconstitutional the same bill enacted in 1912.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

"Game Laws" — Revocation of License for Violation of — Sale of Game.

R. L., c. 92, § 14, is a "game law" within the meaning of St. 1911, c. 614, as amended, providing for the revocation of the hunting license of a person violating its provisions.

Numbered tags furnished by the Commissioners on Fisheries and Game must be placed upon the bodies of Scotch grouse, European black game and European black plover before they can be sold by dealers under the provisions of St. 1912, c. 567.

FEB. 21, 1916.

Commissioners on Fisheries and Game.

GENTLEMEN: — I am in receipt of your letters of the 15th inst. in which you request my opinion upon the following questions: —

1. Whether a violation of R. L., c. 92, § 14, operates as a forfeiture of the hunting license or certificate of the person so offending.

2. Whether certain tags must be placed upon the bodies of Scotch grouse, European black game and European black plover before they can be sold by dealers under the provisions of St. 1912, c. 567.

R. L., c. 92, § 14, provides as follows: —

Whoever, for the purpose of shooting or trapping, enters upon land without permission of the owner thereof, after such owner has conspicuously posted thereon notice that shooting or trapping thereon is prohibited, shall be punished by a fine of not more than twenty dollars.

St. 1911, c. 614, as amended by St. 1912, c. 379, St. 1913, c. 249 and c. 479, and Gen. St. 1915, c. 212, provides, in part, as follows: —

The certificate of any person who shall be convicted of a violation of the *game laws* or of any provision of this act shall be void. . . .

The answer to your first question thus depends upon whether R. L., c. 92, § 14, is to be considered a *game law*. This chapter of the Revised Laws is entitled "Of the preservation of certain birds and animals." The purpose of the section in question is the protection of game even though the protection is only partial, *i.e.*, against trespassers, and I am of the opinion that it comes within the purview of the last-quoted statute.

The answer to this question, therefore, must be in the affirmative.

St. 1912, c. 567, § 1, prohibits in general terms the dealing in or sale of game. Section 3 of this act authorizes your commission to license the rearing for sale and killing of certain game and birds, and section 5 authorizes the sale by dealers of certain imported birds, but in each of these sections there is a positive provision that certain numbered tags shall be fixed to each body or carcass so sold.

It seems to me that this provision is mandatory, and your second question must also be answered in the affirmative.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — Police Power — Regulation of Sale of Theatre Tickets.

A bill seeking to regulate the prices at which and the places where theatre tickets may be sold is not a valid exercise of the police power, and therefore would be unconstitutional if enacted.

A bill providing that no theatre tickets shall be sold unless a seat is available at the time of the sale would be a constitutional exercise of the police power as protecting the public against fraud.

FEB. 25, 1916.

Committee on Mercantile Affairs.

GENTLEMEN: — I am in receipt of your letter of the 23d inst. in which you request my opinion upon the constitutionality of House Bills Nos. 951, 952 and 953. The first two bills seek to regulate the prices of tickets to theatres and other places of amusement and to limit the places at which such tickets may be sold. All these bills involve the same questions of law and will be considered together.

Similar questions have frequently come before the courts, and the following decisions have almost uniformly been reached: —

First. — That a theatre is not a public enterprise but is a private business, and consequently not governed by the same rules which relate to common carriers and other public institutions of a like character. 38 Cyc. 264; *People* v. *Flinn*, 189 N. Y. 180; *Collister* v. *Hayman*, 183 N. Y. 253; *People* v. *Steele*, 231 Ill. 340; *People* v. *Powers*, 231 Ill. 560.

Second. — That such a business is subject to regulation by the State only in the exercise of its police power for the protection of the public health, safety, morals or general welfare.

Third. — That the regulation here attempted is not a valid exercise of the police power.

In the case of *Ex parte Quarg*, 149 Cal. 79, a statute of California made it a misdemeanor for any person to sell or offer for sale "any ticket or tickets to any theatre or other place of amusement at a price in excess of that charged originally by the management of such theatre or public place of amusement." The court in holding this statute to be unconstitutional said: —

> The police power is broad in its scope, but it is subject to the just limitation that it extends only to such measures as are reasonable in their application and which tend in some appreciable degree to promote, protect, or preserve the public health, morals, or safety, or the general welfare. The prohibition of an act which the court can clearly see has no tendency to affect, injure, or endanger the public in any of these particulars, and which is entirely innocent in character, is an act beyond the pale of this limitation, and it is therefore not a legitimate exercise of police power. The sale of a theatre ticket at an advance upon the original purchase price, or the business of reselling such tickets at a profit, is no more immoral, or injurious to public welfare or convenience, than is the sale of any ordinary article of merchandise at a profit.

See also *People* v. *Steele*, 231 Ill. 340; III. Op. Atty.-Gen., 491, 492.

For the above reasons it would seem clear that these bills, if enacted, would be unconstitutional.

In House Bill No. 953, which provides that it shall be unlawful to sell tickets of admission to theatres, concert halls or other places of amusement purporting to entitle the holder to a seat, unless a seat is available at the time of the sale and at the time of the entrance of the purchaser into the theatre, a different question of law is involved.

The protection of the public against fraud is a well-recognized branch of the police power, in the exercise of which the

State may abridge an individual's freedom to contract, even in private business. Instances of this are the laws regulating the sale of oleomargarine and merchandise in bulk, and the laws relating to weights, measures and packages. As was said by the court in *Plumley* v. *Massachuseits*, 155 U. S. 461, "The Constitution does not secure to any one the privilege of defrauding the public." See also *John P. Squire & Co.* v. *Tellier*, 185 Mass. 18, in which the constitutionality of St. 1903, c. 415, regulating the sale of goods in bulk, was upheld upon this ground.

I am of the opinion, therefore, that House Bill No. 953, if enacted, would be constitutional.

Yours truly,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — Police Power — Deductions from Employee's Pay.

House Bill No. 1713, providing that no employer shall deduct from an employee's pay more than the amount of wages in actual time lost on account of the employee's coming late to work, is a valid exercise of the police power and would be constitutional if enacted.

MARCH 6, 1916.

Hon. CHANNING H. COX, *Speaker of the House of Representatives.*

DEAR SIR: — I have the honor to acknowledge an order passed by the House of Representatives on Feb. 18, 1916, in the following form: —

Ordered, That the Attorney-General be requested to render an opinion to the House of Representatives as to the constitutionality of House Bill No. 1713, entitled "An Act relative to deductions from the pay of employees who are late in coming to work."

The bill referred to in this order is entitled "An Act relative to deductions from the pay of employees who are late in coming to work." It provides as follows: —

SECTION 1. No employer shall deduct from an employee's pay more than the amount of wages in actual time lost on account of the employee's coming late to work.

SECTION 2. Whoever violates the provisions of this act shall be punished by a fine of not more than fifty dollars.

A difficulty of construction lies at the outset of the question propounded by the order. Literally construed, it appears that deductions for all causes are prohibited, as well as those on account of the coming late to work by the employee, as it would seem that the phrase "on account of the employee's coming late to work" does not refer to the *reason* for deductions but to the *amount* which may be deducted in any event.

Again, it is open to the interpretation that it is not limited to employees receiving wages, but applies to all employees, however paid. If so construed, the bill, in my judgment, would be unconstitutional.

I think, however, it is intended by the bill to forbid employers deducting from the wages of an employee on account of his coming late to work more than an amount proportionate to the actual time the employee was late, on account of the damages claimed to be suffered by the employer by reason of the employee's tardiness. Adopting that construction, I proceed to consider the bill.

The "right of acquiring, possessing and protecting property" and the right to the enjoyment of "life, liberty and property" are secured to every citizen by the Constitution of Massachusetts, as well as by the Constitution of the United States. These rights include the right to use one's powers and faculties in any reasonable way for the promotion of his interests, and the right to make contracts with others, and can be regulated by the Legislature in the exercise of the police power only in the interest of the public health, the public safety or the public morals, and, in a certain restricted sense, of the public welfare.

The question presented, then, is whether this bill, if enacted, would be a reasonable exercise of this power in the interests of the public welfare. This matter is one in the first instance for the Legislature to determine, and its determination will not be revised by the court unless it is clearly unwarranted.

That the public welfare is involved in the manner and time in which certain employees are paid, is evidenced by our weekly payment law, the constitutionality of which was upheld upon this ground by the Supreme Judicial Court in *Opinion of the Justices*, 163 Mass. 589, and our laws relating to the assignment of wages. *Commonwealth* v. *Martel*, 200 Mass. 482.

The proposed act will deprive the employer of no right which he now has to discharge the employee. The act does not purport to preclude the employer from recovering in an action against

the employee damages which he has sustained, if any, on account of the employee's tardiness, in addition to the amount which he is authorized to deduct from the employee. Nor, in my judgment, does it necessarily follow that, if the act should be construed to prohibit such an action, it would be unconstitutional. The contractual relations of substantially all whom it affects are at will, that is, terminable at the pleasure of either party. Thus, it is difficult to conceive of any claim for substantial damages for tardiness that an employer would ever have against any employee to which the act applies, in addition to the deduction which the act permits him to make from such employee's wages. A contention, therefore, that the act requires an employer to pay for that which he has not received seems to me fanciful rather than substantial.

I am not unmindful of the case of *Commonwealth* v. *Perry*, 155 Mass. 117, in which our Supreme Judicial Court held unconstitutional a statute providing as follows: —

> No employer shall impose a fine upon or withhold the wages or any part of the wages of an employee engaged at weaving for imperfections that may arise during the process of weaving.

That statute was interpreted by the court as requiring payment in full of a price agreed upon for good work when only imperfect work had been done. This bill merely provides that if the employer does not elect to discharge his employee and permits him to work when he comes late, he shall be permitted to deduct from the employee's wages only an amount proportional to the actual time that he is late. He is permitted to deduct a pro rata amount, and thus he pays only a partial wage for partial time. He is forbidden to deduct any amount on account of more remote damages; in other words, he is permitted to deduct a pro rata amount on the ground that in most cases that will constitute the full amount of his damages, and in the exceptional cases, where more remote damages are suffered, he is left to his action at law. In my opinion this is a very different situation from that before the court in the case cited.

Furthermore, in my judgment it cannot be said that this bill is too broad in its application, and that it is thus an unreasonable interference under the police power with the right of contract. As I construe it, the bill is limited in its scope to a class of employees who can fairly be said to need its protection. It does not apply to all employees, but only to those who earn

wages. Though the line between wages and salary is not a clearly defined one, in the main the term "wages" is used to describe compensation paid, usually at a daily or weekly rate, for the performance of labor, skilled or otherwise. To use a phrase frequently appearing in our statutes, wages is the compensation paid to "laborers, workmen or mechanics." In my view this bill applies only to laborers, workmen and mechanics, and perhaps to a few other employees who earn wages and yet do not come strictly within that description, and not to all persons standing in the relation of employer and employee. Thus construed, the classification adopted by it seems to me to be a reasonable one.

I assume the purpose of the act is to prohibit an employer from arbitrarily deducting an amount determined by himself from the wages of an employee, and to prevent the imposition of fraud and oppression upon a class of persons not in a favorable position to protect themselves.

I am unable to say that no just ground exists for such legislative interference, if properly limited, and accordingly, if the General Court enacts the bill, I am of the opinion that it will be constitutional. If it is deemed expedient to enact the bill, I suggest it be amended to eliminate ambiguity. Without amendment, it might be construed otherwise than I have construed it, and, in that event, much more difficult questions as to its constitutionality would arise.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Tidewaters — Authority of Harbor and Land Commissioners to grant Licenses to build Structures in Tidewater.

The authority of the Board of Harbor and Land Commissioners to license, with the approval of the Governor and Council, under R. L., c. 96, § 17, the building of structures in tide water is not strictly limited by § 22, but the last-mentioned section indicates only the legislative policy in regard to such licenses and the legislative intent as a guide to the courts in construing such licenses.

MARCH 14, 1916.

To His Excellency the Governor, and the Honorable Council.

GENTLEMEN: — In your communication of March 1, 1916, you request my opinion upon the legality of a license granted by the Board of Harbor and Land Commissioners to the Rock-

port Granite Company. I assume that your inquiry is as to how far the authority of the Board of Harbor and Land Commissioners to grant licenses for the erection of structures in tidewater below high-water mark, under the provisions of section 17 of chapter 96 of the Revised Laws, is limited by the provisions of section 22 of said chapter.

The title to all land below low-water mark is in the Commonwealth unless the same has been alienated by it. From immemorial practice, licenses for the erection of structures both above and below low-water mark have been granted by the Legislature, or by some body delegated by it to grant such licenses, and I assume that there is now no question as to the authority under the Constitution to make such grants.

That the upland owner has no rights in tidewater of which the public cannot deprive him in the accomplishment of a public purpose seems to be clear. *Commonwealth* v. *Breed,* 4 Pick. 460; *Blood* v. *Nashua & Lowell R.R. Co.,* 2 Gray, 137; *Home for Aged Women* v. *Commonwealth,* 202 Mass. 422.

It would also seem that the right of access of an upland owner to channels and to the sea may be cut off even by individuals engaged in private enterprises under a license by the Legislature. *Nichols* v. *Boston,* 98 Mass. 39; *Attorney-General* v. *Revere Copper Co.,* 152 Mass. 444; *Commonwealth* v. *Boston Terminal Co.,* 185 Mass. 281.

It appears, therefore, that the exercise of the power conferred upon the Board of Harbor and Land Commissioners by section 17 of chapter 96 of the Revised Laws to grant licenses, with the approval of the Governor and Council, for the erection of structures in tidewaters where no established harbor line intervenes is subject to no other limitations than those specified in said chapter 96.

It is to be noted in this regard that under section 24 of said chapter it is provided that the amount of compensation to be paid to the Commonwealth for the rights granted in any land, the title to which is in the Commonwealth, shall be determined by the Governor and Council. This contemplates, in my judgment, the payment of such compensation by the licensee as shall be determined just and equitable by the Governor and Council. I doubt, therefore, the legality of following the suggestion made by the Board of Harbor and Land Commissioners that no charge shall be made for the rights and privileges granted by the license.

Objection is raised that the Board of Harbor and Land Com-

missioners exceeded their authority in issuing the license. It is urged that section 22 of chapter 96 of the Revised Laws restricts their power to issuing licenses for structures that will not "interfere with or impair the right of any person affected thereby to equal proportional privileges of approaching low-water mark or one hundred rods from high-water mark, or harbor lines established by law, or to impair the right to obtain a license or authority so to approach of persons having interests in lands or flats which may be affected thereby."

I am of the opinion that this is not a fair construction of said section 22, and am fortified in that opinion by the fact that the statute was originally passed in 1869 (St. 1869, c. 432), at a time when there was no authority to build structures upon or to fill up or enclose flats except by a license from the General Court. The provisions of the statute as originally passed were as follows: —

> All license or other authority that has heretofore been granted, or that may hereafter be granted, to build structures upon, or to fill up or inclose any such ground, shall be, as far as reasonably and justly may be practicable, so construed as not to interfere with or impair the right of any person affected thereby to equal proportional privileges of advancing to or towards low-water mark, or one hundred rods from high-water mark, or harbor lines established by law, or so as to impair the opportunity of persons having interests in lands or flats that may be affected thereby to obtain license or authority so to advance. Nothing in such license or authority shall be so construed as to impair the legal rights of any person.

Prior to the passage of the statute of 1869 it was provided by section 4 of chapter 149 of the Acts of 1866 that —

> All persons that have been or may be authorized by the legislature to build over tide-waters any bridge, wharf, pier or dam, or to fill any flats, or to drive any piles below high-water mark, who have not already begun such work, shall, before beginning it, give written notice to the harbor commissioners of the work they intend to do, and submit plans of any proposed wharf or other structure, and of the flats to be filled, and of the mode in which the work is to be performed; and no such work shall be commenced until the plan and mode of performing the same shall be approved in writing by a majority of the said harbor commissioners. And the said commissioners shall have power to alter the said plans at their discretion, and to prescribe the direction, limits and mode of building of the wharves and other structures, to any extent that does not diminish or control the legislative grant.

The effect of the statute of 1869, taken in connection with the provisions of law then existing, was in effect a direction to the Harbor Commissioners that in the approval and supervision of the work authorized by a license from the General Court they should, so far as was reasonably and justly practicable, construe the legislative grant so as not to impair the rights of others, in so far as this could be done without diminishing or controlling the legislative grant. It also indicated the legislative intent as a guide to the courts in construing licenses granted.

In 1872 (St. 1872, c. 236, § 1) power was given to the Harbor Commissioners to license the filling of flats and the erection of structures in tidewaters within the line of riparian ownership and within whatever harbor lines might be established.

In 1874 (St. 1874, c. 347) the Harbor Commissioners were given the power to license the filling of flats and the erection of structures below the line of riparian ownership, where no harbor line had been established, subject to the approval of the Governor and Council.

It was not until the passage of the Public Statutes, in 1882, that the provisions of law contained in chapter 432 of the Acts of 1869 referred in terms to licenses granted by the Board of Harbor and Land Commissioners.

I am of opinion, therefore, that the effect of section 22 of chapter 96 of the Revised Laws is the same as applied to a license granted by the Board of Harbor and Land Commissioners and approved by the Governor and Council as to a license or grant by the Legislature itself.

In so far as the statute applies to licenses granted by the Board of Harbor and Land Commissioners and approved by the Governor and Council, the terms for construction and extension being prescribed therein, it can have little, if any, effect except to indicate to the Board of Harbor and Land Commissioners and the Governor and Council the policy that in the judgment of the General Court the Harbor and Land Commissioners and the Governor and Council should follow in exercising the power of authorizing the filling of flats and the erection of structures in tidewaters, delegated to them by the General Court. Exceptional cases in the administration of the powers given to the Board of Harbor and Land Commissioners and the Governor and Council necessarily will arise where it is impracticable to preserve unimpaired the right of persons affected to equal proportional privileges of approaching low-

water mark or one hundred rods from high-water mark, and to what extent these privileges shall be impaired is left to the Board of Harbor and Land Commissioners and the Governor and Council to determine.

So far as the remonstrants to the approval of the license are concerned I am unable to see how their legal rights are impaired by the extension of the pier in the manner proposed. In no substantial way will it impair access to their upland beyond the impairment by the present pier.

A further objection is raised by the remonstrants that the proposed structure will affect the tidal currents in such a way as to cause a gradual filling of the cove and a shallowing of the water adjacent to their upland. Whether such a result would ensue is a question of fact which I am unable to determine, and is a matter, in my opinion, primarily for the Governor and Council to consider in determining the wisdom of approving the proposed structure. However, if the construction of the pier should have that result, I am of the opinion that the persons affected thereby would have no claim for damages. *Fitchburg R.R.* v. *Boston & Maine R.R.*, 3 Cush. 88.

Accordingly, I am of the opinion that, if the Governor and Council deem it expedient in the public interest to approve the license granted by the Board of Harbor and Land Commissioners, there is no legal objection to such approval.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — Corporations — Regulation of Sale of Theatre Tickets by.

There is no constitutional objection to a law amending the charter of domestic corporations organized since 1831, engaged in the theatre business, by stipulating in what manner theatre tickets shall be sold by them, nor to making it a condition to the doing of such business in this Commonwealth by foreign corporations that such corporations shall sell their tickets in the manner so stipulated.

MARCH 21, 1916.

Committee on Mercantile Affairs.

GENTLEMEN: — I beg to acknowledge receipt of your favor of the 13th inst. in which you request my opinion on the constitutionality of the enclosed redraft of House Bill No. 951, entitled "An Act to regulate the sale of tickets by theatres and other places of amusement."

The operation of this bill is confined to corporations, and the question therefore involves considerations different from those discussed in my opinion as to the constitutionality of the original bill.

It was early decided that the charter given to a corporation by the Legislature was a contract, within the meaning of the provision of the Federal Constitution which declares that no State shall pass any law impairing the obligation of a contract. *Dartmouth College* v. *Woodward*, 4 Wheat. 518. By St. 1831, c. 81, now R. L., c. 109, § 1, as affected by St. 1903, c. 437, § 2, it is provided that all acts of incorporation passed since the eleventh day of March, 1831, shall be subject to amendment, alteration or repeal by the General Court, and that all corporations which are organized under general laws shall be subject to such laws as may be hereafter passed affecting or altering their corporate rights and duties, or dissolving them.

Subject to the limitation that the power to amend "cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made" (Sinking-fund cases, 99 U. S. 700), any alteration or amendment may be made "that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, and that the Legislature may deem necessary to secure either that object or other public or private rights." *Commissioners* v. *Holyoke Water Power Co.*, 104 Mass. 446, 451; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Spring Vale Water Works* v. *Schottler*, 110 U. S. 347.

A State has the absolute power to exclude foreign corporations from doing business within its borders, subject to the qualification that in so doing it may not interfere with foreign or interstate commerce or agencies employed by the Federal government. This absolute power of exclusion includes the right to allow a conditional exercise of its corporate powers within the State. *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181.

I am of the opinion, therefore, that if the application of section 1 of the bill in question were limited to Massachusetts corporations incorporated since March 11, 1831, it would be constitutional.

There is a difficulty of construction in sections 1 and 3 of the proposed act. The language of these sections is: "that the sale of tickets of admission to such theatre or other places of

amusement at any place at a price in excess of that charged originally by the management of such theatre or other place of amusement . . . is prohibited." The first part of section 1 purports to be only an amendment to charters of certain corporations, while the language above quoted would seem to prohibit a sale of such tickets by any one at an advanced price. I assume that the purpose of this bill is to prohibit these corporations from selling, either directly or through their agents, these tickets at advanced prices. If this is what is desired, I think the phraseology of the bill should be changed so as to make this intent clear. Furthermore, I doubt the power of the Legislature to impose a penalty upon a corporation for acts committed by those over whom it has no control.

The last sentence of section 3 provides for the punishment of foreign corporations "by fine or imprisonment." I know of no way to imprison a corporation.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Insane Asylum — Right to operate on Patient without Consent.

Before a lumbar puncture can be made on an insane patient in an insane asylum, the consent of the patient's guardian must be secured, if the patient is incapable at the time of giving an intelligent consent; if the patient is capable of consenting, his own consent is first necessary.

MARCH 25, 1916.

Dr. L. VERNON BRIGGS, *Secretary, State Board of Insanity.*

DEAR SIR: — I beg to acknowledge receipt of your letter in which you request my opinion upon the right of physicians under your Board to make lumbar punctures upon patients in insane asylums without their consent.

Under date of Feb. 14, 1916, an opinion was rendered by this department to the effect that lumbar punctures could not be made on patients without their consent when such punctures were made for purposes of experimentation and research, and your present question is limited to cases where they are made for the benefit of the patient himself.

Although a lumbar puncture may not, strictly speaking, constitute a surgical operation, I am of the opinion that the legal principles governing the right to perform either would be the same. The authorities upon the question of liability of a phy-

sician performing a surgical operation without the patient's consent are few. The general rule, as stated in 1 Kinkead on Torts, § 375, is as follows: —

The patient must be the final arbiter as to whether he shall take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal one. Consent, therefore, of an individual, must be either expressly or impliedly given before a surgeon may have the right to operate.

This rule, however, is subject to the qualification that —

If a person should be injured to the extent of rendering him unconscious, and his injuries were of such a nature as to require prompt surgical attention, a physician called to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb, and consent on the part of the injured person would be implied. And again, if, in the course of an operation to which the patient consented, the physician should discover conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life or health of the patient, he would though no express consent was obtained or given, be justified in extending the operation to remove and overcome them. *Mohr* v. *Williams*, 95 Minn. 261.

In *Pratt* v. *Davis*, 37 Chicago Legal Notes 213, Aff. 224 Ill. 300, the question arose as to the right of a surgeon to operate upon the plaintiff, an insane woman, without her consent. The surgeon defended, on the ground that the plaintiff's husband had sent her to the defendant's sanatorium and had consented to the operation. After stating that the husband was to be considered the guardian of the plaintiff, the court said: —

But it is obvious that to make good this defense, after it has been admitted, or has otherwise appeared that no consent of the patient herself can be shown, the defendant must show two things affirmatively: first, that the patient was not mentally in a condition to be in control of her body; and secondly, that her husband consented to the operation. If the first of these propositions is not established by him, and it does not appear that the plaintiff was incompetent reasonably to give or withhold her consent, proof of the second, that the husband did consent, would be futile.

Accordingly, I am of the opinion that if the patient at the time of the proposed puncture is incapable of giving an intelligent consent, the consent of the patient's guardian must be

first secured; on the other hand, if the patient is capable of consenting, his own consent is necessary. While the State undoubtedly has broad power over its insane wards, it is unnecessary to consider whether the Legislature could provide for compulsory lumbar punctures, as, in my judgment, no act relating to the treatment of the insane indicates an intent upon the part of the Legislature to so provide.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Boards of Health — Regulation of Private Sanatoria for Consumptives.

While local boards of health may not control or regulate the manner of treatment of consumptive patients in private sanatoria, they may, under the provisions of R. L., c. 75, § 42, as amended by St. 1906, c. 365, order all the patients therein removed to such other hospital or place of reception as they provide.

MARCH 29, 1916.

State Department of Health.

GENTLEMEN: — You have requested my opinion as to the authority of local boards of health to control and regulate the manner of treatment of consumptive patients in private sanatoria or boarding houses, and to prohibit the operation of such institutions as are not approved by them.

A board of health may cause any person infected with a disease dangerous to the public health to be removed to such hospital or other place of reception as it has provided, except in cases where the removal would be dangerous to such person's health, in which case the house in which he remains is subject to the rules and regulations of said board. R. L., c. 75, § 42, as amended by St. 1906, c. 365.

This section is a compilation of Pub. Sts., c. 80, §§ 40, 41 and 75, which was held in *Brown* v. *Murdock*, 140 Mass. 214, not to authorize an interference by the board of health with the possession or control of the house in which there is an infected person where he may be removed without danger to him.

I am of the opinion, therefore, assuming that consumption is a disease dangerous to the public health, that these boards may not under existing statutes regulate the manner of treatment of consumptives in private sanatoria or boarding houses

where such patients may be removed safely, but that it would be within the power of local boards of health to prevent such places from operating by ordering all the patients therein removed to such other hospital or place of reception as it provides.

Very truly yours,
HENRY C. ATTWILL, *Attorney-General.*

Taxes — Municipal Corporations.

Under Senate Bill No. 346, providing for the setting off of a part of the town of Blackstone and incorporating it as the town of Millville after the first day of April, taxes for the current year assessed to inhabitants of and upon property located within the area so set off are payable to the town of Blackstone.

APRIL 17, 1916.

His Excellency SAMUEL W. MCCALL, *Governor of the Commonwealth.*

SIR: — You have asked my opinion as to whether, in the event the provisions of Senate Bill No. 346 become law, taxes for the current year assessed to the inhabitants of, and upon property located in, that part of the town of Blackstone set off as the town of Millville will be payable to the town of Millville or to the town of Blackstone.

Sections 14, 15 and 23 of Part I. of chapter 490 of the Acts of 1909, as amended by section 2 of chapter 198 of the Acts of 1914, provide that poll taxes shall be assessed upon each person liable thereto in the city or town of which he is an inhabitant on the first day of April in each year; that personal estate shall be assessed to the owner in the city or town of which he is an inhabitant on the first day of April; and that taxes on real estate shall be assessed in the city or town in which the estate lies to the person who is the owner or in possession thereof on the first day of April.

While in practice the taxes are assessed later, in contemplation of law they are assessed on the first day of April in each year. On that day the liability of the taxpayer to pay taxes to the town in which he is then an inhabitant or in which he then owns property becomes fixed. *Harmon* v. *Inhabitants of New Marlborough*, 9 Cush. 525.

Accordingly, I am of the opinion that the taxes assessed as of the first day of April, 1916, in that part of the town of

Blackstone which it is proposed by Senate Bill No. 346 to incorporate as the town of Millville, will be payable to the town of Blackstone, notwithstanding the provisions of said bill.

The provisions of said bill are defective in a further respect, in that by section 7 it is provided that the registrars of voters of the town of Millville shall, before the first meeting of the town of Millville, prepare a list of voters in the town of Millville qualified to vote at said meeting. It is obvious that until said meeting is held there can be no registrars of voters of the town of Millville.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Insurance — Purposes.

An insurance company may not be incorporated under the laws of this Commonwealth for the three following purposes: (1) To examine, pass upon and guarantee titles to real estate; (2) To guarantee principal and interest of notes secured by first mortgages on real estate; (3) To act as agent in the collection of principal and interest of mortgage notes.

APRIL 25, 1916.

Hon. FRANK H. HARDISON, *Insurance Commissioner.*

DEAR SIR: — You have requested my opinion upon the question of whether or not the Insurance Commissioner has authority to issue a license to a corporation organized for the three following purposes: (1) To examine, pass upon and guarantee titles to real estate; (2) To guarantee principal and interest of notes secured by first mortgages on real estate; (3) To act as agent in the collection of principal and interest of mortgage notes.

St. 1907, c. 576, § 32, provides, in part, as follows: —

Ten or more persons residents of this commonwealth may form an insurance company for any one of the following purposes:

. . . . . .

Ninth, To carry on the business commonly known as credit insurance or guaranty, either by agreeing to purchase uncollectible debts, or otherwise to insure against loss or damage from the failure of persons indebted to the assured to meet their liabilities.

Tenth, To examine titles of real and personal property, furnish information relative thereto and insure owners and others interested therein against loss by reason of encumbrances and defective title.

The first purpose mentioned in your question comes within the tenth clause above quoted, but the second purpose is not limited to insurance against loss by reason of encumbrances and defective title, and would seem to constitute credit insurance, as defined in the ninth clause, rather than title insurance.

As I construe the provisions of this section, they do not authorize the incorporation of an insurance company to transact both these kinds of business. I am fortified in this construction by the provisions of section 34, which authorize the doing of more than one class of insurance in certain particular instances and do not include the proposed purposes.

Accordingly, the answer to your question must be in the negative.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Militia — Appointment of Adjutants.

An adjutant of the commanding officer of a battalion in a regiment of field artillery is not an adjutant of the commanding officer of a regiment within the meaning of article X. of section I. of chapter II. of the Constitution of Massachusetts, providing for their appointment by commanding officers of the regiment.

MAY 2, 1916.

Brig.-Gen. CHARLES H. COLE, *Adjutant-General.*

DEAR SIR: — You ask my opinion as to whether that part of article X. of section I. of chapter II. of the Constitution of Massachusetts which provides that "the commanding officers of regiments shall appoint their adjutants and quartermasters; the brigadiers their brigade-majors; and the major-generals their aids; and the governor shall appoint the adjutant-general," requires that the adjutants of the commanding officers of battalions in the regiment of field artillery shall be appointed by the commander of the regiment.

An adjutant is a regimental staff officer appointed to assist the commanding officer of a regiment in the discharge of the details of his military duty. The title "adjutant" has been given to officers performing a similar duty to subordinate officers in regiments commanding subdivisions thereof. These officers, in my opinion, are not adjutants of the commanding officers of regiments, in the sense that the words are used in the provision of the Constitution. The purpose of this provi-

sion of the Constitution would seem to be that, as the adjutant of the commanding officer is an assistant to him, upon whom he must rely for the performance of important details of his military duty, he should be free to select as such assistant a person in whom he has absolute confidence.

Whether a military officer is an adjutant to a commanding officer of a regiment, within the meaning of the Constitution, in my opinion, is to be determined by the duties he performs rather than by the name given to him by the provisions of statutes or by military regulations. As I understand it, these officers called adjutants, attached to the battalion staffs, perform details of the military duty of majors and are confidential assistants of such majors. Accordingly, I am of the opinion that they are not, at the time they are assistants to the majors, assisting them in the performance of their military duty, at the same time adjutants to the commanding officer of the regiment, within the meaning of the provisions of the Constitution.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Armories — Municipal Corporations.

A dance or exhibition drill to be held by a military company in an armory of the first class which it occupies is not within the provisions of R. L., c. 102, § 173, prohibiting the carrying on of a public exhibition, show or amusement without a license from the mayor and aldermen of the city in which it is carried on.

MAY 2, 1916.

Brig.-Gen. CHARLES H. COLE, *Adjutant-General, Chief of Staff.*

DEAR SIR: — I beg to acknowledge receipt of your communication requesting the opinion of this department upon the question of whether or not it is necessary for the military companies who occupy armories to secure a license from the respective city authorities when these companies hold exhibition drills or dances in such armories and charge admission.

Armories of the first class, to which I assume your inquiry refers, are constructed upon land acquired by the Commonwealth through the Armory Commissioners, under the provisions of St. 1908, c. 604. By section 132 of this act the quartermaster-general is given full supervision and control of the care and maintenance of all armories belonging to the Com-

monwealth. In my opinion this includes not only the armory building itself but the land belonging to the Commonwealth upon which the armory is erected.

St. 1908, c. 604, as amended by St. 1914, c. 752, authorizes the use of armories not only for strictly military purposes, but also for such purposes incidental thereto as may be designated by the Commander-in-Chief and for public purposes.

The holding of exhibition drills or dances would seem to come within the authorized purposes, for the proceeds derived therefrom must be devoted to military purposes. Under the authority of St. 1908, c. 604, § 191, as amended by St. 1915, c. 289, § 7, General Orders No. 24 was issued by the Adjutant-General's office, which provided, in part, as follows: —

> The funds of an organization, company or detachment shall consist of the gross amount of all monies received from all sources for or in behalf of such organization, company or detachment or the members thereof, and such funds shall be considered military funds and shall be administered in the manner prescribed by these regulations.
>
> No expenditure shall be made other than for military purposes of the organization, company or detachment.

R. L., c. 102, § 173, provides that it shall be unlawful to carry on a public exhibition, show or amusement without a license from the mayor and aldermen of the city in which it is held, and the question here presented is whether this section applies to agencies of the State. It is to be presumed as a matter of law that the Legislature, in delegating this power to the mayor and aldermen of cities, had primarily in view the regulation of the conduct of the citizen and not that of the State.

Former Attorney-General Knowlton, in discussing a similar question, said: —

> The fountain of the police power of the Commonwealth is the Legislature acting under the authority of the Constitution. The Legislature has seen fit to delegate a portion of this police power to local boards of health. Although this delegation is absolute in terms, it is not to be construed as exclusive of the authority of the Commonwealth, or against its public policy. It would certainly be against public policy to hold that a local and transient board should have greater authority over the property of the Commonwealth, cared for and controlled by the officers of the Commonwealth, acting under direct authority of the Legislature, than those officers themselves. . . . It follows, therefore, that, although the delegation of authority to local boards of health

is general in its terms and purports to embrace all persons and property within the limits of the town, there is an implied exception of such property as is cared for and controlled by the Commonwealth itself, and under its special and peculiar jurisdiction. I. Op. Atty.-Gen. 290.

In *Teasdale* v. *Newell & Snowling Construction Co.*, 192 Mass. 440, which was a case arising upon petition of the board of health of the city of Quincy to restrain the defendants from maintaining without a license a stable which they had on the land taken by the Commonwealth to accommodate a large number of horses, which the defendants were using in performing a contract with the Metropolitan Park Commission, the court said: —

> Such an act must be regarded as needful in the proper execution of the powers which the State may exercise over its own property; and the general law made for the regulation of citizens must be held subordinate to this special statute regulating the use of the property of the State unless there is express provision to the contrary.

To summarize: I am of the opinion that the purposes for which the armory is proposed to be used have been authorized by the Legislature, so that the carrying out of these purposes is to be considered the act of an agency of the State; and therefore the general statute prohibiting the holding of public exhibitions or dances without a license from the mayor and aldermen of the city does not apply.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Taxes — Approval of by Tax Commissioner — Bond of Collector for Cities.

By Gen. St. 1916, c. 131, the duty is imposed upon the Tax Commissioner to approve the form of bonds of collectors of taxes for cities unless inconsistent with some provision in the city charter.

MAY 8, 1916.

Hon. W. D. T. TREFRY, *Tax Commissioner.*

DEAR SIR: — I beg to acknowledge your request for my opinion as to whether chapter 131 of the General Acts of 1916, imposing upon you the duty of approving the form of bonds required of tax collectors, applies to the bonds of collectors of cities as well as of towns.

Section 2 of chapter 26 of the Revised Laws is as follows: —

Chapter twenty-five and all other laws relative to towns shall apply to cities so far as consistent with the general or special laws relative thereto; and cities shall be subject to the liabilities, and city councils shall have the powers, of towns; the mayor and aldermen shall have the powers and be subject to the liabilities of selectmen, and the city clerks, treasurers, and other city officers, those of corresponding town officers, if no other provisions are made relative to them.

The act of 1916 under consideration is an express amendment of a section of chapter 25 of the Revised Laws. Accordingly, in my opinion the new statute imposes upon you the duty of approving the bonds of collectors of cities in all cases except where there is some provision of law in the charter of a particular city or otherwise which is inconsistent with the performance of such duty by you.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — Due Process of Law — Collateral Loan Company.

It is within the constitutional power of the Legislature to amend the charter of the Collateral Loan Company by requiring it in the future to distribute for charitable purposes the excess of its profits over 8 per cent. and the net proceeds of the sale of unredeemed pledges above the amount of the loan after holding the same one year.

But an act requiring said corporation to turn over to charity the net proceeds of all sales of unredeemed pledges since 1875 above the amount of the loan, unclaimed for more than a year, would be unconstitutional.

MAY 8, 1916.

Hon. WILTON B. FAY, *Chairman, Committee on Banks and Banking.*

DEAR SIR: — In behalf of your committee you request my opinion as to whether House Bill No. 1320, entitled "An Act relative to the Collateral Loan Company," would be constitutional if enacted. I understand from you that this bill, which was once reported by your committee, has been recommitted to it by the Senate and is now before the committee for further action.

Section 1 of the proposed bill restores to the act incorporating the Collateral Loan Company (St. 1859, c. 173) certain

sections which were struck out of that act by chapter 65 of the Acts of 1875. The sections which it is thus proposed to restore are as follows: —

Section 8. If the property pledged is not redeemed within the time limited, the same shall be sold at public auction, and the net surplus, after paying loan charges and expenses of all kinds, shall be held one year for the owner; if not then called for, the same shall go into a fund for the year, when the entire forfeiture takes place, called the "Profit and Loss Fund." *Section 9.* All losses on loans from failure of title, or other cause, shall be satisfied from the said profit and loss fund. *Section 10.* The net balance of said fund, at the end of each year, shall be made up annually to the first day of January, and be doled in fuel to the needy, under the direction of the board, during the months of January, February and March. *Section 12.* The whole sum earned each year shall be duly disposed of at the end of the year, the earnings to be divided among the stockholders shall never exceed eight per cent per annum, and the balance, if any, shall go into said profit and loss fund, and be distributed in charity, as hereinbefore provided.

From the time of the original incorporation of this company down to 1875 the provisions then struck out, and now proposed to be restored, limited the dividends of the company to eight per cent., and required it to distribute the excess of its profits over eight per cent. and the net proceeds of the sale of unredeemed pledges above the amount of the loan, with interest and expenses, after holding one year, to certain charitable purposes. Thus, this corporation was, during the first sixteen years of its existence, in part engaged in the administration of a public charity.

Chapter 65 of the Acts of 1875 struck out from its charter all provisions requiring it to devote any funds however acquired to charitable purposes, and left it an ordinary business corporation. In my opinion, since the enactment of the last-mentioned statute, the Collateral Loan Company can be regarded in no way as holding any of its funds for a charitable purpose. The first section of the proposed bill merely restores the obligation to devote funds to charitable purposes which was in its original charter. In my opinion it is plainly within the power of the Legislature thus to amend the charter of this corporation. This amendment, if enacted, would impose its obligation upon the corporation from the time when the amendment takes effect. Thus, in my opinion section 1 of the proposed bill would be constitutional if enacted.

The second section of the bill raises an entirely different question. It is as follows: —

All surplus proceeds of the sales of unredeemed pledges by the Collateral Loan Company since March twenty-third, eighteen hundred and seventy-five, which have remained unclaimed for more than one year, together with all accumulated interest thereon, shall be paid by the Collateral Loan Company to and shall be expended by the city of Boston for the relief of the poor and needy.

When this corporation makes a sale of an unredeemed pledge for an amount in excess of what is due it from the pledgor, it is under an obligation to repay that amount to the pledgor upon demand at any time within one year after the date of the sale. This provision as to one year is apparently a special statute of limitations imposed in favor of this corporation against claims of pledgors of this character. After the one-year period has run, the corporation is in precisely the same situation as any debtor against whom a creditor cannot maintain an action by reason of a statute of limitations. It has a right to waive the statutory provision and pay its debt if it chooses, but it cannot be required by legal proceedings to do so. Though the Supreme Court of the United States has decided otherwise under the Federal Constitution (*Campbell* v. *Holt*, 115 U. S. 620), there is grave doubt, in view of many intimations made by our Supreme Judicial Court, whether the General Court has, under the Constitution of the Commonwealth, any power to repeal or remove the bar of a statute of limitations after the statutory period has once run. *Bigelow* v. *Bemis*, 2 Allen, 496, 497; *Prentice* v. *Dehon*, 10 Allen, 353, 355; *Ball* v. *Wyeth*, 99 Mass. 338, 339; *Danforth* v. *Groton Water Co.*, 178 Mass. 472, 476; *Dunbar* v. *Boston & Providence R.R.*, 181 Mass. 383, 386. If we assume that it cannot do so, the obligation of this corporation to return any surplus proceeds of sales of unredeemed pledges to pledgors has been discharged by the operation of the statute of limitations, and any funds in its hands accruing from such a source have become its own absolute property free from a claim of any sort on the part of any pledgor. On this view it would be beyond the power of the General Court to deprive this corporation of such property without compensation.

On the other hand, if the view of the Supreme Court of the United States be adopted, and it be held that the Legislature

may remove the statutory bar, in case of debts, even though the statutory period has already run, in that event the Legislature would have no power to do more than restore to the various pledgors their rights of action. To go farther, and to take such property and turn it over to the city of Boston to be distributed for charity, would be taking without due process of law the property of these pledgors. There is no analogy between the provisions of the section under consideration and the existing law as to unclaimed savings bank deposits. Though such deposits are turned over to the Commonwealth, they are always held by it subject to an obligation to pay over the full amount at any time to any depositor who is able to prove his claim. In my opinion, therefore, section 2 of the proposed bill would be unconstitutional if enacted.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Firemen's Relief Fund — Workmen's Compensation Act — "Laborers, Workmen and Mechanics."

A regular fireman of the city of Boston who was impressed into service of the Peabody fire department by its chief at a serious fire in that town, and who was injured in performing that duty, is a fireman within the meaning of R. L., c. 32, § 73, as amended by St. 1906, c. 171, and is entitled to share in the benefit of the firemen's relief fund.

A fireman is not a laborer, workman or mechanic within the meaning of St. 1913, c. 807, and one who is injured in the performance of his duty is not debarred by section 5 from sharing in the firemen's relief fund by reason of his having been erroneously paid some compensation on account of the same injury.

MAY 11, 1916.

Mr. D. ARTHUR BURT, *Secretary, Commissioners of the Firemen's Relief Fund.*

DEAR SIR: — Your letter of the 2d inst. requests my opinion upon the question of whether or not your Board may pay from the firemen's relief fund a proper sum for benefits to a fireman who was injured in the following circumstances: you state that a regular fireman of the city of Boston happened to be in the town of Peabody at a time when a serious fire occurred, and that he was ordered by the chief of the Peabody fire department to assist that department in its work of extinguishing that fire, in obeying which order the Boston fireman was

severely injured. I assume that by "chief" is meant chief engineer.

R. L., c. 32, § 73, as amended by St. 1906, c. 171, provides that this fund shall be used "for the relief of firemen who may be injured in the performance of their duty at fires or in going to or returning from fires, and for the relief of widows and children of firemen killed in the performance of their duty. . . ."

Section 74 of the same chapter provides that —

> Officers and members in active service in all incorporated protective departments co-operating with fire departments, and any person performing the duties of a fireman in a town having no organized fire department, shall be entitled to the benefits thereof.

Sections 14 and 15 of this chapter give firewards the power to require assistance in extinguishing fires, and fix a penalty for the refusal to obey any such order.

Section 65 of this chapter provides that —

> Engineers shall have and exercise within their district the powers and authority of firewards of towns relative to the extinguishment of fires and the demolition of buildings. . . .

It is to be noted that if these injuries occurred in a town in which no organized fire department existed, this man would, under the provisions of section 74, be entitled to the benefits of this fund. The statute does not in terms cover the case of an impressment into the service of a person in a town which has an organized fire department, but, in my opinion, the statute was not intended to exclude this class of persons. Where a man is impressed into the service of a fire department by order of the proper authorities, he becomes for the time being a fireman, and it is his duty, as such, to aid in the extinguishment of the fire under the orders of the chief.

In a town where no organized fire department exists, however, the situation is clearly different, for a person who there aids in the extinguishment of a fire cannot become a member of any fire department, for there is none. It seems to me that section 74 was enacted with this difference in view, and was intended to remove, rather than create, any distinction between persons performing the duties of a fireman in towns having no organized fire department and persons impressed into the service of a regular fire department.

Accordingly, I am of the opinion that if you find that the Boston fireman was impressed into the service of the fire department of the town of Peabody under the provisions of sections 14, 15 and 65 of chapter 32 of the Revised Laws, and that he received his injury in the performance of his duty as such impressed fireman, he is entitled to the benefits of this fund.

Your letter also requests my opinion upon the status of certain injured firemen who have claimed compensation under the provisions of St. 1913, c. 807, and who have received some compensation from the cities or towns by which they were employed by virtue of a ruling of the Industrial Accident Board that such persons came within the class of "laborers, workmen or mechanics," within the meaning of said statute.

The Supreme Judicial Court in *Dorney's Case*, 223 Mass. 270, decided March 3, 1916, overruled these decisions of the Industrial Accident Board and decided that a fireman was not entitled to compensation under this act.

St. 1913, c. 807, § 5, provides as follows: —

> Any person entitled to receive from the commonwealth or from a county, city, town or district the compensation provided by Part II. of said chapter seven hundred and fifty-one, who is also entitled to a pension by reason of the same injury, shall elect whether he will receive such compensation or such pension, and shall not receive both. In case a person entitled to such compensation from the commonwealth or from a county, city, town or district receives by special act a pension for the same injury, he shall forfeit all claim for compensation, and any compensation received by him or paid by the commonwealth or by the county, city, town or district which employs him for medical or hospital services rendered to him may be recovered back in an action at law. No further payment shall be awarded by vote or otherwise to any person who has claimed and received compensation under this act.

While the prohibition in the last sentence of this section appears to be very broad, I am of the opinion that, taken in connection with the rest of the section, which requires that the person must be entitled to receive the compensation in order to have it apply to pensions, this sentence must be construed in a like manner as applying only to persons who rightfully receive compensation under this act, that is, to persons who have a right to participate in either of two funds, and elect to, and do, participate in one.

Accordingly, I am of the opinion that these firemen, whose compensation has now ceased, are not debarred from receiving the benefits of your fund by these facts.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Municipal Liens — Repeal of Laws relating to.

If House Bill No. 1943, providing for the repeal of Gen. St. 1915, c. 227, were allowed to become a law there would be no legislation in force, except as to the city of Boston, under which a municipality could establish a lien for the construction of streets, sewers and sidewalks.

MAY 15, 1916.

To His Excellency SAMUEL W. MCCALL, *Governor of the Commonwealth.*

SIR: — Your letter of the 13th inst. requests my opinion upon the question of whether, if House Bill No. 1943, entitled "An Act relative to municipal liens for public improvements," were allowed to become a law, there would remain any statutes under which a lien could be established in favor of municipalities for public improvements.

This bill provides for the repeal of chapter 227 of the General Acts of 1915, which reads as follows: —

SECTION 1. No municipal lien shall attach to any real estate in consequence of any order of a municipal board or other authority for the construction of a street, sewer or sidewalk until the work shall have been completed and an assessment levied, within one year thereafter, for the benefits conferred upon the various parcels of land benefited by the improvement. The assessment shall be levied upon the parcels of land benefited by the improvement as they existed on the first day of April next preceding the completion of the work. The assessment shall describe by metes and bounds each parcel assessed and shall state the names of the owners of record at the time of the assessment, if the names can reasonably be ascertained; otherwise the assessment may be made to owners unknown. The order of assessment, together with a plan showing in detail the lots assessed, if recorded in the registry of deeds for the county and district wherein the land lies within thirty days after the date of the assessment, shall create a lien on the land which shall remain until the assessment is paid or abated according to law.

SECTION 2. All acts and parts of acts inconsistent herewith are hereby repealed.

SECTION 3. This act shall not apply to the city of Boston.

R. L., c. 8, § 4, provides, in part, as follows: —

In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the general court, or repugnant to the context of the same statute; that is to say: —

First, The repeal of an act or resolve shall not revive any previous act or resolve. . . .

The primary inquiry, then, is as to what inconsistencies exist between the provisions of the act of 1915 and the statutes relating to municipal liens in force at the time of the passage of that act.

R. L., c. 49, § 23, provides that —

All assessments and charges for main drains and common sewers, whether in the nature of assessments or charges for the use of such sewers or annual charges or otherwise upon any land which abuts upon a street in which such sewer is laid or otherwise, shall constitute a lien upon said land. The lien shall continue for two years after the assessments or charges have been committed to the collector, or if they are to be paid by instalments, for two years after the last instalment has been committed to the collector unless paid sooner. . . .

By section 45 of this chapter the provisions of section 23 are made to apply to sidewalk assessments.

Section 33 of this chapter provides that assessments for connecting private premises with public sewers "shall be a lien upon the land and shall be added to, and collected as a part of the annual tax for the ensuing year upon such land." There is no limitation upon the time within which a sewer or sidewalk assessment must be made in order to have a lien attach; the time for which the lien continues is limited; and there is no requirement of recording the order of assessment and plan of the lots assessed, except that as to cities section 23 of chapter 50 requires that the original order be recorded within ten days after its passage. In all these respects the provisions of this chapter are inconsistent with the act of 1915.

R. L., c. 50, § 10, provides that —

Assessments for betterments and other public improvements shall constitute a lien upon the land assessed and shall be enforced in the manner provided for the collection of taxes.

R. L., c. 13, § 35, relating to the collection of taxes, provides as follows: —

Taxes assessed upon land, including those assessed under the provisions of sections sixteen, seventeen and eighteen of chapter twelve shall with all incidental charges and fees be a lien thereon from the first day of May in the year of assessment. Such lien shall terminate at the expiration of two years from the first day of October in said year, if the estate has in the meantime been alienated; otherwise it shall continue until an alienation thereof.

By section 17 of said chapter 50, if the assessment is payable in instalments, the lien continues for two years after the last instalment was committed to the collector.

The time during which an assessment may be made for the laying out of a street or way is limited by section 1 of chapter 50 to two years after the passage of the order authorizing the laying out of such streets or ways.

The provisions of chapter 50 are thus inconsistent with the act of 1915 in the same respects as the preceding chapter.

The only particular, then, in which the provisions of these chapters can be said not to be inconsistent with the earlier part of the later act is in the bare creation of a lien. But it is to be noted that the latter part of section 1 of the act of 1915 does more than to limit or subject to conditions the operation of the prior statutes as to the enforcement of the lien. It supersedes rather than amends. It provides for the creation of municipal liens and purports to be complete in itself.

For these reasons, I am of the opinion that the previous statutes in so far as they related to the creation of municipal liens for the construction of streets, sewers and sidewalks were repealed by the act of 1915, except as to the city of Boston, and the only question remaining to be considered is whether a ruling that the previous enactments would not be revived by the repeal of the act of 1915 would be "inconsistent with the manifest intent of the General Court, or repugnant to the context of the same statute." Obviously, it could not be the latter, for the bill in question contains only the repealing provision. Whether such a ruling would be determined by the court to be inconsistent with the manifest intent of the Legislature, presents a difficult question. For many years provisions have existed for the establishment of municipal liens and proceedings for their collection, and special provisions have been enacted for the city of Boston. In view of the fact that the provisions for municipal liens in the city of Boston are left unimpaired, and that the laws pertaining to the establishment of liens in

cities and towns have existed for a long period of time, a strong argument might be made that it was manifestly not the intent of the Legislature to repeal all provisions for the establishment of such liens outside of Boston. On the other hand, applying the rules governing the construction of legislative enactments prescribed by R. L., c. 8, § 4, it would seem by the repeal of chapter 227 of the General Acts of 1915 that the provisions of law repealed by the latter statute were not revived upon its repeal.

Consequently, although with some hesitation, I must advise you that I am of the opinion that if the bill in question were allowed to become a law, there would be no legislation in force, except as to Boston, under which a municipality could establish a lien for the construction of streets, sewers and sidewalks.

Yours truly,

HENRY C. ATTWILL, *Attorney-General.*

Dentistry — Candidate for Registration in — Educational Requirements of.

A candidate for registration in dentistry is eligible for examination or re-examination after June 1, 1916, even though he has not the educational requirements prescribed by Gen. St. 1915, c. 301, § 5, provided that such candidate had applied for examination and paid his examination fee before this section took effect.

MAY 17, 1916.

Dr. THOMAS J. BARRETT, *Chairman, Board of Registration in Dentistry.*

DEAR SIR: — Your letter of the 13th inst. requests, on behalf of the Board of Dental Examiners, my opinion upon the following questions: —

1. Has a candidate whose application and fee have been received by the secretary of the Board, and who has not appeared for examination and does not possess a college diploma, any rights as to taking the examination after June 1, 1916?

2. Has a candidate whose application and fee have been received and accepted by the secretary of the Board, and who has taken one examination and failed, and who is not possessed of the educational requirements, any right to a re-examination after June 1, 1916?

3. If these candidates have rights, how far can the Board of Dental Examiners go in permitting re-examination of candidates who were eligible under the old law?

Gen. St. 1915, c. 301, § 5, now requires, among other things, that in order for a candidate to be eligible for examination he must either be a graduate of a reputable dental college, or, having spent three years in such a college, successfully passed all examinations for the first and second years.

Section 14 of this chapter provides for the repeal of the former laws on this subject, but goes on to say: —

> The provisions of this act . . . shall not affect . . . any right accrued or established . . . under the authority of the repealed laws.

This act becomes effective, as to its educational requirements, June 1, 1916.

R. L., c. 77, § 26, as amended by St. 1908, c. 294, which was the law in force at the time of the passage of the above statute, provided, in part, as follows: —

> Any person of twenty-one years of age or over, upon payment of a fee of twenty dollars, which shall not be returned to him, may be examined by said board at a regular meeting with reference to his knowledge and skill in dentistry and dental surgery; . . . An applicant who fails to pass a satisfactory examination shall be entitled to one re-examination at any future meeting of the board, free of charge, but for each subsequent examination, he shall pay five dollars. . . .

The candidate having made application and paid the $20 fee, it would seem that the right to be examined thereby accrued to him and was not affected by the act of 1915, above referred to. Accordingly, I am of the opinion that he is entitled to be examined after June 1, 1916.

Your second question involves similar considerations and, for the reasons above stated, I am of the opinion that such a candidate as you mention is entitled to a re-examination after this date.

In answer to your third question I beg to advise that, in my opinion, your Board should limit the right to examination or re-examination of candidates who are not possessed of the educational requirements prescribed by the later act, after June 1, 1916, to such as have applied for examination and paid their examination fees before that date.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Insurance — Cash Assets in Excess of Liabilities.

Where a mutual fire insurance company has cash assets in excess of its liabilities to an amount greater than is permitted by St. 1907, c. 576, § 47, this excess is not reduced by the establishment of a guaranty capital and the issuance to trustees of certificates of stock to the amount of such guaranty capital, which are not sold.

May 17, 1916.

Hon. Frank H. Hardison, *Insurance Commissioner.*

Dear Sir: — You have called my attention to the fact that St. 1907, c. 576, § 47, limits the amount of cash assets which a mutual fire insurance company may hold in excess of its liabilities to 2 per cent. of its insurance in force, and that a certain mutual company has a very substantially larger amount of cash assets than is permitted by the foregoing section. It has, under the advice of counsel, sought to avoid the effect of this section and to reduce its cash assets by establishing a guaranty capital of $200,000, issuing to trustees certificates of stock to this amount, which are not being sold, and contends that thereby a liability of $200,000 is created which is to be deducted from its assets, and that accordingly it no longer has cash assets in excess of 2 per cent. of its insurance in force.

You request my opinion as to whether the establishment of a guaranty capital in this manner lawfully accomplishes the result sought.

Upon its face this at the best seems to be a colorable transaction, and I should not be inclined to advise you, in your administrative capacity, to admit its efficacy unless the law clearly required it. However, in the present case it seems to me manifest that the excess of cash assets of this company remains just the same as before.

Without considering whether the statute requires payment for such stock at par in cash, such a company could not lawfully create a guaranty capital and give it away. Clearly, the stock could lawfully be issued in such a way as to create a liability only by the receipt of its fair value. In a case like the present there could seem to be no question but what the stock is worth par, in view of the company's excess of cash assets over liabilities. Upon the receipt of $200,000 for the $200,000 of stock, the amounts would just cancel each other and the excess of cash assets would remain the same. If the stock after issuance were purchased by the company, such payment would be made from the cash assets of the company. If

the company can lawfully invest a portion of its cash assets in the purchase of its own guaranty capital, the stock would become a part of its cash assets, and the net result would remain unchanged; that is, the excess would still be the same.

In other words, any issue of this stock in such a way as to be a lawful issue would leave the excess of cash assets the same as before. Any unlawful issue of this stock cannot properly be regarded as creating a liability.

Accordingly, I am of the opinion that the means which have been employed in this case have not resulted in reducing the excess of cash assets held by the company.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — Regulation of Streets — Solicitation of Business on.

Senate Bill No. 482, making it an offense to solicit any one other than an acquaintance upon any public sidewalk in front of a retail store, other than one in which the solicitor is interested, to purchase at another store goods similar in kind to any kept or displayed in such store would be constitutional, if enacted, as being a reasonable regulation of the use of the highways. See St. 1916, c. 289.

MAY 24, 1916.

J. WESTON ALLEN, Esq., *Chairman, Committee on Bills in the Third Reading.*

SIR: — Your letter of the 20th inst. requests my opinion upon the constitutionality of Senate Bill No. 482, entitled "An Act to prohibit unfair and malicious solicitation of business on public ways and sidewalks," which reads as follows: —

Whoever, upon any public sidewalk in front of any retail store other than his own, or one in which he is employed, accosts any person not acquainted with him, and there tries to induce such person to purchase at any other store or place, at retail, merchandise similar in kind to any kept or displayed for sale in such store, shall be punished by fine not exceeding one hundred dollars.

The title of this act would seem to be inappropriate, for the reason that by the terms of the bill the solicitation prohibited is not limited to unfair and malicious solicitation. I suggest, therefore, that the title be amended by striking out the

words "unfair and malicious," in order to indicate more accurately the scope of the bill and to obviate any ambiguity between its title and its text.

If this is done, I am of the opinion that the constitutionality of the bill could be sustained, if enacted, as a reasonable regulation of the use of the highways.

A somewhat similar question arose in the case of *Commonwealth* v. *Ellis*, 158 Mass. 555, where the constitutionality of a city ordinance which prohibited the selling of any goods in the streets without a permit from the superintendent of streets was assailed. The court, in upholding the constitutionality of this ordinance, said: —

> Any one who has observed the obstruction to travel and the general inconvenience which are caused by a stationary object in our crowded and narrow streets, would be slow to declare unreasonable a prohibition intended to prevent that inconvenience. We are of opinion, both on principle and on authority, that for this purpose the city council lawfully may forbid public selling in the streets.

See also *Commonwealth* v. *McCafferty*, 145 Mass. 384.

It is true that what is sought to be regulated by the bill is different from what was regulated by the ordinance above referred to; the bill prohibits solicitations, while the ordinance applied only to sales. Furthermore, the bill deals with only a particular kind of solicitation. Whether there is more reason to regulate this particular class of solicitations than solicitations in general, primarily is for the Legislature to determine, and I am unable to say that solicitations of the kind included in the bill are not so much more likely to create disturbances and obstructions in the highway than solicitations generally, as to warrant such a classification by the Legislature.

It might be urged with some force that the basing of the exception upon the fact of acquaintance with the solicitor rather than the acquaintance of the solicitor with the person accosted is unreasonable and arbitrary, in that it makes the test of a man's criminality the memory or state of mind of another. To obviate this objection I advise that the bill be amended by inserting the word "being" after the word "not" at the end of the second line.

Yours truly,

HENRY C. ATTWILL, *Attorney-General.*

Taxation — Domestic Corporations — Deductions.

Notes, bills receivable, cash on deposit in banks or trust companies and other intangible property of a like nature belonging to a domestic corporation are not deductable as property situated in another State and subject to taxation therein in the determination of its franchise tax under the provisions of St. 1909, c. 490, Pt. III., § 41.

May 24, 1916.

Hon. William D. T. Trefry, *Tax Commissioner.*

Dear Sir: — I beg to acknowledge your request for my opinion as to whether, under St. 1909, c. 490, Pt. III., § 41, the deduction described as "the value of its property situated in another State or country and subject to taxation therein," to be made in determining the taxable value of the franchise of a domestic corporation, should include notes, bills receivable, cash and other items of similar intangible property.

Whatever doubt may have existed as to the interpretation to be given this provision of law in the past appears to have been entirely removed by the decision of the court in *Bellows Falls Power Co.* v. *Commonwealth,* 222 Mass. 51. In that case the petitioner, a Massachusetts corporation, owned stock in a Vermont corporation. Under the laws of Vermont all shares of stock in Vermont corporations are taxable in that State. The question arose whether, in determining the taxable value of the franchise of the corporation, such Vermont stock should be regarded as subject to taxation in this Commonwealth if owned by a natural person, and also whether it was situated in another State and subject to taxation therein. The court held that notwithstanding the statutes of Vermont this Commonwealth had the right to tax shares in Vermont corporations when owned by residents of the Commonwealth, and thus held that these shares of stock were "securities which if owned by a natural person resident in this Commonwealth would be liable to taxation."

The court also held that such shares of stock in a Vermont corporation were not "property situated in another State and subject to taxation therein," within the meaning of section 41 of the tax act. The court says, at page 63: —

It follows from what has been said that the shares of stock are not "property situated in another State and subject to taxation therein." The context in which these words occur in our tax law and its other

general provisions demonstrate that these words refer to the kind of property which, if owned by an individual and situated and taxed in another State, would be exempt from taxation here, such as real estate, and "merchandise, machinery and animals." St. 1909, c. 516, § 1; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194. There are substantial, although intangible, elements of property in shares of stock in a corporation which attach to the owner resident in this Commonwealth.

The paragraph just quoted is a plain statement that the provision in the tax act under consideration, permitting a deduction of "property situated in another State and subject to taxation therein," applies only to tangible property which, if situated and taxed in another State, is, by the decision of the Supreme Court of the United States cited, necessarily exempt from taxation in the State of the residence of the owner. This does not apply to items of intangible property of the character referred to by you. Whether taxable in another State or not, there are "substantial, although intangible, elements of property" in items of this character "which attach to the owner resident in this Commonwealth."

Apparently, in the main, it is the purpose of the statute providing for the payment of a domestic corporation franchise tax that a corporation in the determination of its franchise tax should be treated upon substantially the same basis as an individual in the assessment of his property taxes. Accordingly, deductions are made from the fair cash value of all the shares of the corporation of the value of all property owned by it upon which it is taxable in the Commonwealth or which would be exempt from taxation if held by an individual. An individual resident in Massachusetts is taxable here upon all intangible personal property whether or not it has a situs for purposes of taxation outside the Commonwealth. An individual, however, is, by the decision of the Supreme Court of the United States already referred to, exempt from taxation upon all tangible property permanently situated in other jurisdictions. The ruling of our Supreme Judicial Court, which I have quoted, seems to place individuals resident in Massachusetts and domestic corporations upon precisely the same basis.

Accordingly, I must advise you that, in accordance with the ruling of our court above quoted, notes, bills receivable, cash on deposit in banks or trust companies and other intangible property of a like nature are not deductable as property situ-

ated in another State or country and subject to taxation therein, in the determination of the domestic corporation franchise tax.

Yours very truly,
HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — Police Power — Power of State to prohibit the Use of Trading Stamps.

Senate Document No. 438, which prohibits the selling or giving, in connection with the sale of any article of merchandise, of any trading stamps or similar devices entitling the holder to either a cash or property premium, would be unconstitutional if enacted, inasmuch as the bill prohibits the giving of a cash premium to be paid by the seller independently of any arrangement by him with any other person, *i.e.*, a discount. But *it seems* it would be within the constitutional power of the Legislature to prohibit the dealing in trading stamps or similar devices in which any person other than the vendor or vendee of the merchandise sold has an interest.

MAY 27, 1916.

J. WESTON ALLEN, Esq., *Chairman, Committee on Bills in the Third Reading.*

DEAR SIR: — I beg to acknowledge the receipt of your letter of the 24th inst., in which the House committee on bills in the third reading requests my opinion upon the constitutionality of House bill printed as Senate No. 438. That bill is as follows: —

SECTION 1. No person, firm or corporation shall, in connection with the sale of any article or any merchandise whatsoever, sell, give or deliver any trading stamps, coupons or similar devices, whether such trading stamps, coupons or similar devices are or are not attached to or form a part of the article or package of merchandise sold. This act shall apply to any device which entitles the holder thereof, when such device is presented alone or in connection with others, to a cash premium or property premium.

SECTION 2. A violation of this act shall be a misdemeanor, and shall be punished by a fine of not less than ten nor more than one hundred dollars.

SECTION 3. This act shall take effect on the first day of January, nineteen hundred and seventeen.

Statutes the provisions of which were similar to those of the proposed act have been considered by the Supreme Judicial

Court on several occasions. In but two instances has the Supreme Court expressed any opinion as to the constitutionality of acts similar in character; *i.e.*, in the case of *O'Keeffe* v. *Somerville*, 190 Mass. 110, and in an opinion of the justices, rendered to the House of Representatives in 1911 and reported in 208 Mass. 607, in which the justices unanimously were of the opinion that statutes of this character were unconstitutional as violating the provisions of the Fourteenth Amendment to the Constitution of the United States and the Declaration of Rights, Article I., of the Massachusetts Constitution.

My immediate predecessor, Hon. Thomas J. Boynton, expressed similar views in relation to a proposed act to impose a license fee of $6,000 upon persons engaged in the business of furnishing trading stamps.

The Supreme Court of the United States, on March 6, 1916, in three cases, namely, *Rast* v. *Van Deman & Lewis*, *Tanner* v. *Little* and *Pitney* v. *Washington*, held that the regulation or prohibition of the giving of trading stamps or other devices in connection with the sale of goods, entitling the purchaser to anything other than cash in addition to the principal article of purchase, under the police power of a State was not in violation of any rights guaranteed by the Fourteenth Amendment or other provisions of the Constitution of the United States. The court expressly stated that in arriving at this decision it in no way intimated what its view would be in relation to the giving of trading stamps or other devices redeemable solely in cash.

It is very plain, therefore, that up to March 6, 1916, it would have been the duty of the Attorney-General of this Commonwealth to advise your committee that the proposed act would be unconstitutional. It follows that the question presented for me to answer is an extremely delicate one in that it requires a speculation upon what effect these recent decisions of the United States Supreme Court may have upon the views heretofore expressed by the justices of our Supreme Judicial Court. It will be observed that in the opinion of the justices to the House of Representatives, above referred to, the justices based their opinion not only upon the Fourteenth Amendment to the United States Constitution but upon the Declaration of Rights, and, if our court is still of the opinion that the Declaration of Rights of the Constitution of Massachusetts prohibits the enactment of legislation of the character then in question, it follows that the decisions of the Supreme Court of the

United States are not controlling, and that Senate No. 438 would be unconstitutional. In so far as the opinion of the justices of the Supreme Judicial Court was based upon the Fourteenth Amendment to the Constitution of the United States, the decisions of the United States Supreme Court are controlling.

Furthermore, it should be noted that opinions rendered to the Legislature, or either branch thereof, are not to receive the same weight as decisions in actual cases before the court, as was well stated in *Opinion of the Justices,* 214 Mass. 599, as follows: —

> It has been said repeatedly that answers given by the justices to questions propounded by the Legislature have not the binding force of decisions of the court, but are the opinions of the individual justices acting as constitutional advisers to a co-ordinate department of the government. The doctrine of *stare decisis* does not apply to them, but they are open to reconsideration and revision.

These decisions being brought to your attention, it would seem that the members of your committee are as competent as the Attorney-General to determine to what extent, if at all, the justices of the Supreme Judicial Court based their previous opinions upon the provisions of the Declaration of Rights in distinction from those of the Fourteenth Amendment, and to what extent they would be influenced in passing upon the constitutionality of a statute of this character by the reasons advanced by the Supreme Court of the United States. In this connection it should be borne in mind that the Supreme Judicial Court has said, in the case of *Commonwealth* v. *Strauss,* 191 Mass. 545, at 550, that —

> Rights relied upon under the Fourteenth Amendment to the Constitution of the United States, and under the Declaration of Rights in the Constitution of Massachusetts, are substantially the same.

Although I feel, as I have before stated, that my opinion in relation to the constitutionality of the proposed act can be of but little value to your committee, nevertheless, I deem it my duty, in view of the provisions of section 7 of chapter 7 of the Revised Laws, as you have required my opinion, to express my views in relation to the proposed act. As I interpret this bill absolutely to prohibit the giving of any stamp or other device

entitling the holder thereof to a cash premium to be paid by the seller, independently of any agreement or arrangement by him with any person other than the holder of such stamp or device, I am of the opinion, in the light of the decisions above referred to, that the bill would be unconstitutional if enacted. On the other hand, if the provisions of the act are limited to the giving of or dealing in stamps or other similar devices in which any person other than the vendor or vendee of the merchandise sold has an interest, by contract, arrangement or otherwise, I can see no sound reason why it should be declared unconstitutional. I have always felt that if, in the opinion of the Legislature, conditions have arisen in connection with the use of trading stamps, either by reason of the form of contract or the methods of distribution and sale employed, which tend to the creation of a monopoly or to the restraint of trade, it is well within the police power of the State to prohibit the use of stamps in such a way.

It may be that the Legislature has ascertained that the control of the business of the issuance of trading stamps in the State, or portions thereof, has, by the operation of methods adopted by trading stamp companies, become largely centered in one company. This was a condition found to exist in the city of Boston by the Supreme Judicial Court in the case of *Merchants Legal Stamp Co.* v. *Murphy*, 220 Mass. 281. It may be that the Legislature has found, as was expressed in that case, that trading stamps now have become "an essential element of a form of bargain and sale which a very appreciable portion of the public demands." It may be that in the judgment of the Legislature, in many communities in the State where trading stamps have become of general use, competitive stores cannot be successfully opened without the use of the same kind of trading stamps as are used by their competitors, and in this way the trading stamp companies have it largely in their power to restrain competition in those communities. That the Legislature has the power to deal with contracts tending to create monopolies or tending to restrain trade seems to be unquestionable. *Commonwealth* v. *Strauss, supra.* In my opinion the Legislature has an equal power to deal with methods and schemes of business which tend to create a like condition. As was said in the case of *Louisville & Nashville R.R.* v. *Kentucky*, 161 U. S. 677, at 701, cited with approval by our own court in the case of *Commonwealth* v. *Strauss, supra:* —

The general rule holds good that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State, and within legislative control, and in the exertion of such power the Legislature is vested with a large discretion, which, if exercised *bona fide* for the protection of the public, is beyond the reach of judicial inquiry.

These considerations induce me to believe that if the Legislature finds conditions to exist such as I have before observed, it has the power, notwithstanding any provisions of the Declaration of Rights of the Constitution of Massachusetts, to pass legislation fairly adapted to correct these conditons.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Pawnbrokers — Interest on Small Loans.

The rate of interest which may be charged by pawnbrokers for small loans is not affected by St. 1911, c. 727, § 7, as amended by Gen. St. 1916, c. 224.

JUNE 3, 1916.

Hon. FRANK H. POPE, *Supervisor of Loan Agencies.*

DEAR SIR: — I beg to acknowledge your letter in which you request my opinion as to whether the rate of interest to be charged by pawnbrokers is limited by the provisions of section 7 of chapter 727 of the Acts of 1911, as amended by chapter 224 of the General Acts of 1916. Said section, as amended, reads as follows: —

The supervisor shall establish the rate of interest to be collected, and in fixing said rate shall have due regard to the amount of the loan and the nature of the security and the time for which the loan is made; but the total amount to be paid on any loan for interest and expenses shall not in the aggregate exceed an amount equivalent to three per cent a month on the amount actually received by the borrower, computed on unpaid balances; and no licensee or company or association to which this act applies shall charge or receive upon any loan a greater rate of interest than that fixed by the supervisor. No charge, bonus, fee, expense or demand of any nature whatsoever, except as above provided, shall be made upon loans to which this act relates.

It is my view that said amendment of section 7 in no way enlarged the classes of persons or the classes of loans included within the provisions of St. 1911, c. 727, and amendments

thereof. The answer to your inquiry, therefore, is dependent upon the interpretation of other provisions of said chapter 727.

At the time of the passage of said chapter 727 there were in chapter 102 of the Revised Laws distinct provisions relating to pawnbrokers and to persons other than pawnbrokers engaged in making small loans. Section 3 of said chapter 727, as originally passed, provided: —

> No person, partnership, corporation or association shall directly or indirectly engage in the business of making loans of three hundred dollars or less, if the amount to be paid on any such loan, for interest and expenses, exceeds in the aggregate an amount equivalent to twelve per cent per annum upon the sum loaned, without first obtaining from the supervisor of loan agencies a license to carry on the said business in the city or town in which the business is to be transacted.

This section, standing alone, would necessarily include pawnbrokers where the amount of a loan made by pawnbrokers was not in excess of $300. But this section must be interpreted in the light of other provisions of the act in order to determine the intent of the Legislature. Section 21 of said chapter amended section 41 of chapter 102 of the Revised Laws so as to read as follows: —

> The board which grants licenses to pawnbrokers shall from time to time establish regulations to the satisfaction of the supervisor of loan agencies, relative to the business carried on and the rate of interest to be charged by them; and a pawnbroker shall not charge or receive upon any loan a greater rate of interest than that fixed by the licensing board.

This section, taken in connection with the fact that, under the provisions of section 24 of said chapter 727, section 60 and sections 57, 58, 59, 61, 62, 63, 64, 65, 66, 67 and 68 of chapter 102 of the Revised Laws were specifically repealed, indicates to my mind that it was the intention of the Legislature to leave the provisions of sections 33 to 45, inclusive, of chapter 102 of the Revised Laws unaffected except in so far as they were affected by the provisions of section 21 of said chapter 727.

The result is that, in my judgment, pawnbrokers and the rates to be charged by them are in no way subject to the provisions of said chapter 727 and the amendments thereof, except that the rates established as to pawnbrokers by licensing boards, under the provisions of chapter 102 of the Revised

Laws, are subject to the approval of the Supervisor of Loan Agencies.

Accordingly, I am of the opinion that the rates that may be charged by pawnbrokers are not subject to or controlled by the provisions of section 7, as amended by chapter 224 of the General Acts of 1916.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Cold Storage — Reports to State Department of Health.

The report required to be made to the State Department of Health by cold-storage companies by St. 1912, c. 652, § 2, should include a report of broken eggs as well as whole eggs.

Under St. 1912, c. 652, § 2, the State Department of Health may require cold-storage warehouses to report the number of pounds of articles of food placed in cold storage.

JUNE 8, 1916.

ALLAN J. MCLAUGHLIN, M.D., *Commissioner of Health.*

DEAR SIR: — You ask in your letter of May 31, 1916, for the construction of St. 1912, c. 652, § 2, with reference to the cold storage of eggs and articles of food. This section refers to licenses issued by the State Department of Health for cold-storage and refrigerating warehouses, and reads, in part, as follows: —

. . . Every such licensee shall furthermore submit a quarterly report to the state board of health on a printed form to be provided by the board. The report shall be filed on or before the twenty-fifth day of January, April, July and October of each year, and it shall state the quantities of articles of food placed in cold storage during the three months preceding the first day of the said months, respectively, and also the quantities of butter and eggs held on the first day of the month in which the report is filed.

You ask, "Does the word 'eggs,' as used in this connection, mean only eggs in the shell, or does it also include the broken-out eggs?" You also inquire if your department can insist upon such warehouses reporting to your department the number of pounds of articles of food placed in cold storage, instead of reporting the number of packages of food without setting forth the weight of the same.

This statute was intended to provide supervision by the health authorities of food products kept in cold-storage warehouses, and is clearly a health measure. In order to secure proper inspection and regulation, reports must be filed with the State Department of Health, as provided in section 2.

Section 8 provides that "broken eggs packed in cans, if not intended for use as food," shall be marked in a way to indicate that fact. There seems to be as much reason for requiring reports to be made of broken eggs as of whole eggs, and said provision of section 8 gives force to the construction that under the provisions of the act an egg is to be considered an egg, whether in the shell or broken and packed in a can. Accordingly, I am of the opinion that broken eggs are "eggs" within the provisions of said section 2.

I am also of the opinion that the State Department of Health may insist upon statements of the exact quantities of food products contained in such warehouses, either by weight or bulk as it may determine, in order properly to supervise and regulate the cold storage of food products.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Witnesses — Power of State Board of Labor and Industries to Summon.

Under an order passed by the House of Representatives requiring the State Board of Labor and Industries to inquire as to whether certain telegraph operators were discharged by a telegraph company because they were members of a union, this board does not have the power to summon witnesses and require the production of books and papers in relation thereto.

JUNE 19, 1916.

State Board of Labor and Industries.

GENTLEMEN: — I beg to acknowledge receipt of your letter of the 13th inst., requesting my opinion upon the question of whether your Board has the power to summon witnesses and require the production of papers in relation to the subject of the inquiry contained in an order passed by the House of Representatives. Said order is as follows: —

Ordered, That the State Board of Labor and Industries be required to inquire as to whether the recent discharge of telegraph operators by the Western Union Telegraph Company in the city of Boston was

because of membership in the Commercial Telegraphers Union of America, an organization composed of commercial telegraphers in the employ of the various telegraph companies; and urge upon all parties at interest the necessity of taking such action as will prevent a strike, which would seriously handicap the commercial and indutsrial activities of the entire country.

Many of the boards and departments of the Commonwealth have been given express power to summon witnesses and require the production of papers, instances of which are the State Board of Conciliation and Arbitration, the Industrial Accident Board, the Massachusetts Highway Commission, the Civil Service Commission and the Bureau of Statistics. That this power cannot be implied as reasonably incidental to carrying out the duties of your Board would seem clear, for otherwise the express power given to the boards above mentioned would become meaningless and mere surplusage, so that, unless this power was conferred upon your Board by said order, your question must be answered in the negative.

The House of Representatives undoubtedly has the power to summon witnesses and to compel the production of papers, at least where the inquiry is germane to proposed legislation, and this power may be exercised either directly or by means of committees. *Burnham* v. *Morrissey*, 14 Gray, 226.

In that case the court said: —

> We therefore think it clear that it [the House of Representatives] has the constitutional right to take evidence, to summon witnesses, and to compel them to attend and to testify. This power to summon and examine witnesses it may exercise by means of committees.

It is extremely doubtful whether this power could be delegated by the House to State departments, for it must be borne in mind that the House of Representatives is not the Legislature, but only a part of it, and therefore an order of the House is not equivalent to an act of the Legislature. It is, however, unnecessary for the purposes of this opinion to decide this question, for the order does not purport, at least expressly, to convey this power; and I am of the opinion, for the reasons above indicated, that this power is not to be implied.

The answer to your question, therefore, must be in the negative.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Hawkers and Pedlers — Right of Minor to be licensed as.

A boy fifteen years of age may be licensed as a hawker and pedler under the provisions of R. L., c. 65, as amended by Gen. St. 1916, c. 242, at least if an employment certificate has been issued to him by the proper school authorities.

June 22, 1916.

Thure Hanson, Esq., *Commissioner of Weights and Measures.*

Dear Sir: — I beg to acknowledge your request for my opinion as to whether you have authority to grant a hawker's and pedler's license for the town of Clarksburg to a boy fifteen years of age, residing in North Adams, whose application is accompanied by the certificates required by section 19 of chapter 65 of the Revised Laws, signed by a majority of the selectmen of Clarksburg.

Chapter 65 of the Revised Laws, as amended by chapter 242 of the General Acts of 1916, does not appear to contain any provision regulating the issuance of such licenses by you to minors. Section 17, which provides for the regulation by cities and towns of sales by minors, applies only to the sale by hawkers and pedlers of the articles mentioned in section 15. These articles may be sold without a State license, and cities and towns are authorized to regulate only the sale of such articles. They have no authority under either section 15 or section 17 to impose any restrictions upon or otherwise to regulate the sale of articles not mentioned in section 15. A license from you for the sale of such articles is plainly required by section 19, whether the hawker and pedler be a minor or an adult.

Sections 11 to 15, inclusive, of chapter 831 of the Acts of 1913 regulate the employment of minors in certain street trades, so called. Section 11 prohibits a boy under twelve years of age or a girl under eighteen years of age, in a city having a population of over 50,000, from selling any articles of merchandise of any description in any street or public place.

Sections 12 to 14, inclusive, prohibit any boy under sixteen years of age, in any city having a population of over 50,000 from selling any articles of merchandise in any street or public place unless there has been issued to him by the school authorities both an employment certificate, as provided by law, and a special badge authorizing him to engage in such street trades.

Section 15 forbids any boy under sixteen years of age to sell any articles of merchandise in any street or public place in any

city or town after 9 o'clock in the evening or before 5 o'clock in the morning, in any event, and during school hours, unless provided with an employment certificate.

While these sections do not purport to be a limitation upon your authority to issue hawkers' and pedlers' licenses, in my opinion, in exercising the discretion granted to you, it is proper for you to decline to issue such licenses to minors who are subject to the requirements of these sections unless they have complied therewith.

The result is that I advise you that you have authority to grant a hawker's and pedler's license for the town of Clarksburg to a boy fifteen years of age, and that it is appropriate for you to do so if he submits to you with his application an employment certificate issued by the school authorities of North Adams permitting him to engage in such employment.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Poor — Aid to Dependent Mothers — Power of Overseers of Poor to remove to Place of Settlement.

Neither the overseers of the poor of a city or town which renders aid under St. 1913, c. 763, to a mother with dependent children under the age of fourteen years who has no settlement in such city or town, nor the overseers of the poor of the city or town in which she may have a settlement, can cause the removal of such family to the city or town of settlement.

JUNE 23, 1916.

Mr. FRANK W. GOODHUE, *Superintendent, Division of State Adult Poor.*

DEAR SIR: — You have requested my opinion upon the following questions with reference to families aided under the provisions of chapter 763 of the Acts of 1913: —

1. Have overseers of the poor rendering the aid authority to cause the removal of families to the city or town of legal settlement?

2. Have overseers of the poor of the city or town of legal settlement authority to remove the families from the city or town granting the aid?

3. If overseers of the poor have authority of removal, and if the families are supported in a place in which they have no settlement, would the place liable for their support be required to pay more than at the rate of $2 a week if it causes the families to be removed within thirty days after receiving legal notice that such support has been furnished, as provided in section 19, chapter 81, Revised Laws?

St. 1913, c. 763, § 1, provides: —

In every city and town the overseers of the poor shall, subject to the provisions of the subsequent sections of this act, aid all mothers with dependent children under fourteen years of age, if such mothers are fit to bring up their children. The aid furnished shall be sufficient to enable the mothers to bring up their children properly in their own homes; and such mothers and their children shall not be deemed to be paupers by reason of receiving aid as aforesaid.

Section 6 provides: —

In respect to all mothers in receipt of aid hereunder the city or town rendering the aid shall be reimbursed by the commonwealth, after approval of the bills by the state board of charity, for one third of the amount of the aid given. If the mother so aided has no settlement, the city or town shall be reimbursed for the total amount of the aid given, after approval of the bills by the state board of charity as aforesaid. If the mother so aided has a lawful settlement in another city or town, two thirds of the amount of such aid given may be recovered in an action of contract against the city or town liable therefor in accordance with the provisions of chapter eighty-one of the Revised Laws and acts in amendment thereof and in addition thereto.

R. L., c. 81, §§ 17, 18, 19, 32 and 33, are as follows: —

Section 17. The overseers of the poor, in their respective places, shall provide for the immediate comfort and relief of all persons residing or found therein, having lawful settlements in other places, when they fall into distress and stand in need of immediate relief, and until they are removed to the places of their lawful settlements. The expense thereof and of their removal, or burial in case of their decease, may be recovered in an action of contract against the place liable therefor, if commenced within two years after the cause of action arises, but nothing shall be recovered for relief furnished more than three months prior to notice thereof given to the defendant.

Section 18. A judgment for the plaintiff in such action shall be conclusive as to the settlement of such pauper in any future action between the same parties for his support.

Section 19. If a pauper is supported in a place in which he has no settlement, the place liable for his support shall not be required to pay therefor more than at the rate of two dollars a week if it causes him to be removed within thirty days after receiving legal notice that such support has been furnished.

. . . . . .

Section 32. The overseers of a place to which a person has actually become chargeable may give written notice thereof to, and request

his removal by, one or more of the overseers of the place where his settlement is supposed to be, who may, by an order in writing, directed to a person therein designated, cause such removal to be made.

Section 33. If within one month after receiving such notice, the overseers of the latter place do not cause such removal to be made or a statement in writing signed by one or more of them of their objections to the removal to be transmitted to the overseers requesting such removal, the overseers who requested the removal may, by a written order directed to a person therein designated, cause the pauper to be removed to the place of his supposed settlement; and the overseers thereof shall receive and provide for him; and such place shall be liable in an action to the place incurring the same for the expenses of his support and removal, and shall be barred from contesting the question of settlement in such action unless the settlement is denied in said statement.

Briefly stated, the question presented is as to the meaning of the Legislature in providing in the 1913 act that "two thirds of the amount of such aid given may be recovered in an action of contract against the city or town liable therefor in accordance with the provisions of chapter eighty-one of the Revised Laws. . . ."

While this language is far from clear, I am of the opinion that it was the intention of the Legislature, by the reference made to the Revised Laws, to refer merely to the manner and conditions in accordance with which suit might be maintained, and not thereby to incorporate all of the incidental provisions with reference to the treatment of paupers found in chapter 81.

It is to be noted that the primary purpose of the 1913 act seems to be to provide for the care of young children by their mothers "in their own homes." There are minute provisions for the inspection of these homes and investigation as to the character of bringing up which the children would be likely to receive therein.

If the overseers of the poor, either in the town aiding or in the town of settlement, have the right to remove the family, this purpose of the act would be defeated.

Furthermore, it is to be noted that the act expressly provides that "such mothers and their children shall not be deemed to be *paupers* by reason of receiving aid as aforesaid." The provision of R. L., c. 81, § 19, limiting the amount of recovery to $2 a week if the place of settlement "causes him to be removed within thirty days after receiving legal notice

that such support has been furnished," is expressly applied to "a pauper." Accordingly, I am of the opinion that the terms of this section are not applicable to the aid given under the 1913 act, despite the reference therein to chapter 81 of the Revised Laws.

The provisions of R. L., c. 81, §§ 32 and 33, are not necessary for the determination of the method of procedure in an action to recover against the city or town of settlement for aid furnished. Full provision for such action is found in sections 17 and 18.

While the matter is by no means free from doubt, I am of the opinion, for the reasons stated above, that your first two questions are to be answered in the negative. Such answer makes it unnecessary to consider the third question.

Of course, the foregoing opinion would not prevent the overseers of the poor from advising or assisting the mother in voluntarily moving to her place of settlement. I have assumed that your questions related to causing a removal against the wishes of the mother.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Fire Prevention Commissioner — Fixtures — Automatic Sprinkler System.

Under the facts stated, an automatic sprinkler system upon being installed in a building becomes a part of the real estate, so that an order by the Fire Prevention Commissioner under St. 1914, c. 795, to install such a system in a building would apply under section 22 of this act to the owner of the premises and not to the occupant.

JUNE 24, 1916.

JOHN A. O'KEEFE, Esq., *Fire Prevention Commissioner.*

DEAR SIR: — You have requested my opinion upon the question of whether an order made by you, requiring the installation of automatic sprinklers in a building which has been leased by the owner, applies to the occupant of the premises or to the owner.

St. 1914, c. 795, § 22, provides, in part, as follows: —

In any case where buildings or other premises are owned by one person and occupied by another under lease or otherwise, the orders of the commissioner shall apply to the occupant alone, except where

such rules or orders require the making of additions to or changes in the premises themselves, such as would immediately become real estate and be the property of the owner of the premises. In such cases the rules or orders shall affect the owner and not the occupant, . . .

Our courts have repeatedly said that the question of whether an article attached to a building becomes a part of the real estate is a mixed question of law and fact, and that, as bearing on this question, "the nature of the article and the object, the effect and the mode of annexation, are all to be considered." You state that the sprinkler consists of a series of pipes extending up through the house between the walls, with pipes branching off at each ceiling and equipped every ten feet or so with heads; also that in making an equipment it becomes necessary to cut holes in the walls and sometimes in the floors, and that in installing such a system it is necessary to fit it to the house so much in detail that it would be impracticable, if not impossible, to remove the sprinkler system from a building where it had once been installed to use in another building.

Although the law regards with greater favor the rights of a tenant as against his landlord to remove fixtures installed by him than is accorded to persons standing in a different relation to the landowner, I beg to advise that, upon the whole, I am of the opinion that, in the absence of any agreement to the contrary between the landlord and tenant, an automatic sprinkler such as you have described would, upon becoming installed in a building, become a part of the real estate even as between landlord and tenant, and consequently that your order to install such sprinklers would apply to the owner of the premises and not to the occupant.

Yours truly,

HENRY C. ATTWILL, *Attorney-General.*

Office, Tenure of — When ended by Abolition of Office — Commission on Mental Diseases — Commission on Waterways and Public Lands — Bureau of Prisons — Supervisor of Administration.

Under Gen. St. 1916, cc. 285, 288 and 296, providing for the creation of the Massachusetts Commission on Mental Diseases, the Commission on Waterways and Public Lands and the Bureau of Prisons, respectively, and the abolition of the boards by whom the powers conferred on the new commissioners were formerly exercised, the members of the old boards continued in office until the appointment and qualification of their successors.

Under Gen. St. 1916, c. 241, providing for the abolition of the Board of Prison Commissioners, the offices of chairman and secretary thereof, the office of deputy commissioner, the Board of Parole for the State Prison and the Massachusetts Reformatory, and the Board of Parole for the Reformatory for Women, and for the transfer of the duties formerly exercised by them to a new commission, the tenure of office of the members of the boards so abolished, by the terms of the act, was terminated on July 1, 1916.

June 28, 1916.

His Excellency Samuel W. McCall, *Governor of the Commonwealth.*

Sir: — I beg to acknowledge the receipt of your communication requesting my opinion in relation to the following: —

Chapter 285 of the General Acts of the year 1916, entitled "An Act to abolish the State Board of Insanity and to establish the Massachusetts Commission on Mental Diseases," provides that so much of this act as authorizes the appointment of a commission on mental diseases shall take effect upon its passage. This act received executive approval June 1, 1916. In your opinion do the present members of the Insanity Board continue in office until their successors are appointed and qualified, or does the act compel the Governor to make appointments to take over the work at a specified date, and in the event of his not so doing, will it cause a discontinuance of the work of the Board?

In connection with this act there was also passed an act creating a commission on waterways and abolishing two other boards, as set forth in chapter 288 of the General Acts of 1916. And in further connection with the matter a new Bureau of Prisons was established by chapter 241 of the General Acts of 1916, and further still, by chapter 296 of the General Acts, a Supervisor of Administration was provided for. In these four new acts there is a provision that the boards doing like work shall be abolished, and your opinion is requested in regard to these last three, in substance the same as requested with reference

to the first heretofore mentioned, namely, do the old boards hold over until their successors are appointed and qualified, or is the Governor obliged to make appointments at or before a specific date?

Section 9 of chapter 285 of the General Acts of 1916 provides: —

So much of this act as authorizes the appointment of a commission on mental diseases shall take effect upon its passage. The other provisions hereof shall take effect upon the appointment and qualification of the members thereof, but not before the first day of August, nineteen hundred and sixteen.

It follows that the provisions of the act, except in so far as they authorize the appointment of a Commission on Mental Diseases, do not take effect until the appointment and qualification of the members of said commission. Accordingly, I am of the opinion that the present members of the Board of Insanity continue in office until their successors are appointed and qualified, and until the first day of August, 1916, in any event.

Section 5 of chapter 288 of the General Acts of 1916 provides: —

So much of this act as provides for the appointment of the commission hereby established shall take effect upon its passage. All other provisions thereof shall take effect upon the qualification of the members of said commission, but not earlier than July one, nineteen hundred and sixteen.

What I have said above in connection with chapter 285 of the General Acts of 1916 applies to this act, with the exception of the date.

Section 10 of chapter 296 of the General Acts of 1916 provides: —

So much of this act as provides for the appointment of the supervisor shall take effect upon its passage. All other provisions hereof shall take effect upon the qualification of the said officer but not earlier than July first in the year nineteen hundred and sixteen.

This provision is substantially the same as the provision in the acts above referred to, and therefore, in my opinion, the Commission on Economy and Efficiency continues in office in

any event until the first day of July, 1916, and until the appointment and qualification of the Supervisor.

Section 10 of chapter 241 of the General Acts of 1916 provides: —

So much of this act as provides for the appointment of the advisory prison board, the board of parole and the director of prisons shall take effect upon its passage. All other provisions shall take effect on the first day of July, nineteen hundred and sixteen.

This act was approved May 20, 1916. It evidently contemplated that the Governor should appoint between the time of its passage and the first day of July, 1916, officers to administer the duties prescribed by the act. Section 1 of the act provides: —

The board of prison commissioners existing under authority of chapter two hundred and twenty-two of the Revised Laws, the offices of chairman and secretary thereof, the office of deputy commissioner established under chapter eight hundred and twenty-nine of the acts of the year nineteen hundred and thirteen, the board of parole for the state prison and the Massachusetts reformatory and the board of parole for the reformatory for women established by said chapter eight hundred and twenty-nine, are hereby abolished. All the rights, powers, duties and obligations conferred and imposed by law on said board of prison commissioners, or any member thereof, except as is hereinafter provided, are hereby transferred to and shall hereafter be exercised and performed by the director of the Massachusetts bureau of prisons established by this act, who shall be the lawful successor of said board. All the rights, powers, duties and obligations conferred and imposed by law on said boards of parole are hereby transferred to and shall hereafter be exercised and performed by the board of parole of the Massachusetts bureau of prisons established by this act, which board shall be the lawful successor of said boards.

In my opinion, upon the first day of July, 1916, the date upon which the act takes effect, the Board of Prison Commissioners, the offices of chairman and secretary thereof, the office of deputy commissioner, the Board of Parole for the State Prison and the Massachusetts Reformatory, and the Board of Parole for the Reformatory for Women, are abolished and cease to have any power under the law.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Retirement — Probation Officer.

Gen. St. 1916, c. 225, does not authorize the retirement of a probation officer who, although he has been in the service for twenty consecutive years or more, has devoted his entire time to the duties of his office for only a portion of the twenty-year period.

July 6, 1916.

Commission on Probation.

Gentlemen: — I beg to acknowledge your request for my opinion as to whether chapter 225 of the General Acts of 1916 applies to a probation officer who has faithfully performed his duties as such officer for at least twenty consecutive years, but whose whole time has not been given to his duties during the whole of the twenty-year period.

Section 1 of chapter 225 of the General Acts of 1916 is as follows: —

Any probation officer of any court who shall be eligible to a pension for twenty years' service under the provisions of section one of chapter seven hundred and twenty-three of the acts of the year nineteen hundred and twelve, shall hereafter be retired upon attaining the age of seventy years.

Section 1 of chapter 723 of the Acts of 1912 is as follows:—

Any probation officer or assistant probation officer whose whole time is given to the duties of his office shall, at his or her request, be retired from active service and placed upon a pension roll by the court upon which it is his duty to attend, with the approval of the county commissioners of the county in which the court is situated: *provided*, that he is certified in writing by a physician designated by such court to be permanently disabled, mentally or physically, for further service by reason of injuries or illness sustained or incurred through no fault of his in the actual performance of his duty as such officer. Any probation or assistant probation officer whose whole time is given to his duties as such officer and who has faithfully performed his duties as such officer for not less than twenty consecutive years, and who is not less than sixty years of age, shall also be retired under the provisions of this act at his or her request without the aforesaid certification.

Section 2 then provides that every person retired under the provisions of the act shall receive an annual pension of one-half the compensation received by him at the time of his retirement.

The last sentence of section 1 of chapter 723 of the Acts of 1912 expressly authorizes the retirement at his or her request of "any probation or assistant probation officer whose whole time is given to his duties as such officer and who has faithfully performed his duties as such officer for not less than twenty consecutive years, and who is not less than sixty years of age." In my opinion this provision must be interpreted as authorizing retirement only in cases where the probation or assistant probation officer in question has devoted his entire time during regular working hours to the duties of his office during the whole period of not less than twenty consecutive years. In my opinion it does not authorize retirement in cases where a probation officer has been in the service twenty consecutive years or more and has devoted his entire time to the duties of his office only during a portion of the twenty-year period.

The result is that, in my opinion, in the case stated by you the probation officer is not entitled to be retired at his request, under the provisions of section 1 of chapter 723 of the Acts of 1912, and is not subject to compulsory retirement under the provisions of chapter 225 of the General Acts of 1916.

Very truly yours,
HENRY C. ATTWILL, *Attorney-General.*

Teachers — Duty of State Board of Education to assist in procuring Positions.

The duty imposed by St. 1911, c. 731, as amended by St. 1913, c. 368, upon the State Board of Education to assist teachers to secure positions is limited to positions within this Commonwealth.

JULY 10, 1916.

State Board of Education.

GENTLEMEN: — You have requested my opinion as to whether, under the provisions of St. 1911, c. 731, as amended by St. 1913, c. 368 —

(*a*) Your Board is authorized, through its Teachers' Registration Bureau, to assist teachers to secure positions outside the Commonwealth as opportunity offers.

(*b*) In view of the fact that a larger number of teachers enroll every year in the Bureau than it can help to secure

positions in Massachusetts, does the phrase in section 1, "to procure positions for them so far as may be possible," make it incumbent upon the Board to help such teachers secure positions outside the Commonwealth if opportunity offers?

St. 1911, c. 731, § 1, is as follows: —

> Any graduate of any high school or normal school in this commonwealth, or of any other school considered by the board of education to be of equal grade, or the graduate of any reputable college, provided that such graduate is a person of good character and is a resident of the state, may file an application with the board of education for a position as school teacher upon the payment of a fee of two dollars. The application shall set forth the name, address, and, briefly, the experience and qualifications of the applicant. It shall be the duty of the board of education to communicate with the school committees in the cities and towns of the commonwealth, and with persons who have made application for a position as school teacher in accordance with the provisions of this section, and to procure positions for them so far as may be possible, free of expense to the applicant beyond the aforesaid fee, and without expense to the various school committees. The said board shall cause to be printed and sent to school committees of cities and towns a list of the applicants for positions as aforesaid, with a brief statement of their qualifications and experience.

The remaining sections of the act throw no light upon the questions presented.

Under this act college graduates who are residents of the State, and graduates of any high school or normal school in this Commonwealth, or other school of equal grade, may file their applications. In general, therefore, the applicants would be residents of the Commonwealth.

It is the duty of the Board of Education "to communicate with the school committees in the cities and towns of the commonwealth" and with persons who have filed applications, and "to procure positions for them so far as may be possible, free of expense to the applicant . . . and without expense to the various school committees." It would seem evident that the committees referred to in the last words quoted are the same school committees mentioned earlier in the sentence, to wit, committees in the cities and towns of the Commonwealth.

While the question is not entirely free from doubt, I am of the opinion that the duty "to procure positions" was intended to be limited to procuring such positions through the school committees in the cities and towns of the Commonwealth,

with whom it is made the duty of the Board to communicate. Unless such is the correct interpretation, the provision with reference to communication with the "school committees in the cities and towns of the Commonwealth" becomes surplusage, because if the requirement of procuring positions meant positions anywhere, either within or without the Commonwealth, communication with the various school committees within the Commonwealth would follow as an incident.

It remains to be considered how far the amendment of 1913 affects this construction.

By that act the section quoted above is amended by striking out the words "and is a resident of the state," in the seventh and eighth lines of the quotation above. The effect of this amendment is to permit college graduates to register with the Board, regardless of whether or not they be residents of the Commonwealth. This act was adopted upon the report of the Board of Education to the Legislature, which was printed in 1913 as House Document No. 180, and was reported by the committee to which was referred the recommendations for legislation contained in said report. In this report appears the following: —

Note to No. 3. — The purpose of this act is to increase the efficiency of the service of the Board in helping teachers who are seeking positions, and in aiding superintendents and school committees who are seeking teachers to fill vacancies.

The Board gives such service only to school committees and superintendents within the State, but wishes to secure as large a list as possible of available teachers from both within and without the State.

In view of this history, I am of the opinion that the 1913 amendment did not enlarge the powers of the State Board of Education with reference to the places in which positions were to be procured.

Accordingly, I am of the opinion that both of your questions should be answered in the negative.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Fire Prevention Commissioner — Regulation of Use of Gasoline in Power Boats — Federal Jurisdiction.

While the Fire Prevention Commissioner is authorized by St. 1914, c. 795, to make regulations relative to the use of gasoline on motor boats, this authority does not extend to boats used exclusively on the navigable waters of the United States, as the regulation of boats on such waters is within the power of Congress, and Congress has made regulations governing this subject.

July 17, 1916.

John A. O'Keefe, Esq., *Fire Prevention Commissioner.*

Dear Sir: — I beg to acknowledge your letter in which you ask me the following question: —

Does section 2 of chapter 370 of the Acts of 1904, as amended by chapter 280 of the Acts of 1905, vest in the Fire Prevention Commissioner for the Metropolitan District, through chapter 795 of the Acts of 1914, the right to make regulations governing the use of gasoline in power boats within the waters of the metropolitan fire prevention district?

St. 1905, c. 280, § 1, provides, in part, as follows: —

. . . *Section 1.* The powers and duties heretofore conferred and imposed upon cities and towns and the mayors and aldermen, city councils and selectmen thereof, by chapter one hundred and two of the Revised Laws, to regulate the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of . . . crude petroleum or any of its products, or explosive or inflammable fluids or compounds, tablets, torpedoes or any explosives of a like nature, or any other explosives, . . . are hereby conferred and imposed upon the detective and fire inspection department of the district police, except as to the transportation of said explosives by steam railroads. *Section 2.* The detective and fire inspection department of the district police may make regulations, except as hereinbefore provided, for the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of . . . crude petroleum or any of its products, or explosive or inflammable fluids or compounds, . . . and may prescribe the materials and construction of buildings to be used for any of the said purposes.

St. 1914, c. 795, §§ 2, 3 and 13, are, in part, as follows: —

Section 2. The governor, with the advice and consent of the council, shall appoint a citizen of the commonwealth who shall have resided within the metropolitan district for at least three years, to be called the fire prevention commissioner for the metropolitan district. . . .

Section 3. All existing powers, in whatever officers, councils, bodies, boards or persons, other than the general court and the judicial courts of the commonwealth, they may be vested, to license persons or premises, or to grant permits for or to inspect or regulate or restrain the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of . . . camphine or any similar fluids or compounds, crude petroleum or any of its products, or any explosive or inflammable fluids or compounds, . . . are hereby transferred to and vested in the commissioner.

Section 13. In addition to the powers given by sections one to twelve, inclusive, the commissioner shall have power to make orders and rules relating to fires, fire protection and fire hazard binding throughout the metropolitan district, or any part of it, or binding upon any person or class of persons within said district, limited, however to the following subjects: —

. . . . . .

E. Ordering the remedying of any condition found to exist in or about any building or other premises, or any ship or vessel in violation of any law, ordinance, by-law, rule or order in respect to fires and the prevention of fire.

I am inclined to the opinion that these provisions of law vest in the Fire Prevention Commissioner authority to make reasonable regulations governing the use of gasoline within the metropolitan fire prevention district, whether the use of the gasoline is upon land or upon water. It should be observed, however, that the Congress of the United States has provided that —

Every motor boat and also every vessel propelled by machinery other than by steam, more than sixty-five feet in length, shall carry ready for immediate use the means of promptly and effectually extinguishing burning gasoline (§ 8283) —

and that the Secretary of Commerce and Labor shall make such regulations as may be necessary to secure the proper execution of this provision. See U. S. Comp. Sts., 1913, §§ 8283 to 8285, inclusive. Again, by section 8281 of the Compiled Statutes it is provided that —

Every motor boat subject to any of the provisions of this act, and also all vessels propelled by machinery other than by steam more than sixty-five feet in length, shall carry either life-preservers or life belts, or buoyant cushions, or ring buoys or other device, to be prescribed by the Secretary of Commerce and Labor, sufficient to sustain afloat every person on board and so placed as to be readily accessible.

All motor boats carrying passengers for hire shall carry one life-preserver of the sort prescribed by the regulations of the board of supervising inspectors for every passenger carried, and no such boat while so carrying passengers for hire shall be operated or navigated except in charge of a person duly licensed for such service by the local board of inspectors.

Where Congress, in the exercise of its power to regulate interstate commerce, has dealt with a subject, it excludes the power of a State to make regulations in relation to that subject. *Southern Ry. Co.* v. *Railroad Commissioners of Indiana,* 236 U. S. 439; *Commonwealth* v. *Breakwater Co.,* 214 Mass. 10.

Furthermore, it seems that Congress has the power under the commerce clause to make regulations relative to the safety of boats and passengers thereon while such boats are using the navigable waters of the United States, although not engaged in interstate commerce. *The Scow No. 1,* 169 Fed. Rep. 717.

While I am of the opinion that you are authorized, under the provisions of section 2 of chapter 370 of the Acts of 1904, as amended by chapter 280 of the Acts of 1905, to make regulations relative to the use of gasoline upon motor boats, yet, so far as such boats are used exclusively upon the navigable waters of the United States, regulations upon any subject as to which regulations have been made by or under authority of Congress may be held of no effect, as in conflict with Federal authority.

Very truly yours,
HENRY C. ATTWILL, *Attorney-General.*

Militia — Salaries of Employees of Commonwealth when mustered into Federal Service.

Under Gen. St. 1916, c. 126, State employees serving in the militia may be paid their ordinary salaries only while performing duty under St. 1908, c. 604, and when mustered into the service of the United States and sent out of the Commonwealth the payment of salaries to them as employees of the Commonwealth must cease by virtue of R. L., c. 6, § 58.

JULY 20, 1916.

Board of Trustees of the State Infirmary and State Farm.

GENTLEMEN: — You have requested my opinion as to whether your board has authority to pay the salaries of men in your employ who were members of the Massachusetts Vol-

unteer Militia and who are now in the service of the United States on the Mexican border.

R. L., c. 6, § 58, provides, in part, as follows: —

> . . . No salary shall be paid to any person for a longer period than that during which he has been actually employed in the duties of his office. . . .

It is plain that in the absence of express statutory authority your board has no authority to pay salaries to its employees under the conditions mentioned by you. The only statute of which I am aware which deals with this subject-matter is Gen. St. 1916, c. 126, which is as follows: —

> Any person in the service of the commonwealth shall be entitled, during the time of his service in the organized militia under the provisions of sections one hundred and forty-one, one hundred and forty-two, one hundred and fifty-one, one hundred and fifty-two and one hundred and sixty of chapter six hundred and four of the acts of the year nineteen hundred and eight, and acts in amendment thereof and in addition thereto, to receive pay therefor, without loss of his ordinary remuneration as an employee or official of the commonwealth, and shall also be entitled to the same leaves of absence or vacation with pay given to other like employees or officials.

This statute authorizes the payment of salaries to State employees who are members of the militia only when they are on duty under the above-mentioned sections of St. 1908, c. 604.

Section 141 of that statute provides for the calling out of the militia to repel an invasion or to suppress an insurrection. Obviously, this applies to invasions or insurrections in the Commonwealth. Section 142 covers strike and riot duty; section 151 provides for an annual parade; and section 152, for annual camp duty. Section 160 is as follows: —

> The commander-in-chief may order out any part of the militia for escort and other duties, and may authorize the use of mounted bands.

I am informed that when the militia was first ordered to Framingham they were ordered there for a period of eight days under the last-mentioned section. Some individuals may have been ordered there for longer than that period. Accordingly, while militiamen, employees of the Commonwealth, were serving in camp in Framingham, or elsewhere, under an order given by virtue of section 160, they would be entitled

to receive their salaries from the Commonwealth under Gen. St. 1916, c. 126. When, however, their duty under that order ceased, and they were mustered into the service of the United States and sent out of the Commonwealth in connection with that service, it can no longer be said that they are performing duties under section 160, or any other of the sections mentioned in chapter 126. Accordingly, from the time their duty under section 160 ceased, or, as I am informed, in most instances at the end of a period of eight days from the time when they were called into service, there is, in my opinion, no authority for the payment to them of salaries as employees of the Commonwealth.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Fire Prevention Commissioner — Automatic Sprinklers — Authority to order Installation of.

Buildings in the metropolitan district used as stores which deal in and sell certain commodities mentioned in St. 1914, c. 795, § 10, are used "for the business of keeping" such commodities, and if four or more persons live above the second story of such buildings the Fire Prevention Commissioner has authority to order automatic sprinklers installed therein.

AUG. 3, 1916.

Mr. JOHN A. O'KEEFE, *Fire Prevention Commissioner.*

DEAR SIR: — Your letter of the 1st inst. requests my opinion upon the question of whether you have the power to order automatic sprinklers installed in buildings in the metropolitan district used in whole or in part as stores, which deal in and sell certain commodities mentioned in St. 1914, c. 795, § 10, and in which buildings four or more persons live above the second story.

That section reads as follows: —

Any building within the metropolitan district used in whole or in part for the business of woodworking, or for the business of manufacturing or working upon wooden, basket, rattan or cane goods or articles, or tow, shavings, excelsior, oakum, rope, twine, string, thread, bagging, paper, paper stock, cardboard, rags, cotton or linen, or cotton or linen garments or goods, or rubber, feathers, paint, grease, soap, oil, varnish, petroleum, gasoline, kerosene, benzine, naphtha, or other inflammable fluids, and any building in the metropolitan district used

in whole or in part for the business of keeping or storing any of such goods or articles, except in such small quantities as are usual for domestic use, or for use in connection with and as incident to some business other than such keeping or storing, shall, upon the order of the commissioner, be equipped with automatic sprinklers; *provided, however,* that no such order shall apply to any building unless four or more persons live or are usually employed therein above the second floor.

In my opinion the word "keeping," as used in this section, is broader than "storing," and includes keeping for sale. It is not less a "keeping" because the keeper intends to sell. Indeed, under the word "keep" in the Century Dictionary is found this definition, "to have habitually in stock or for sale."

It follows from this that such a case does not fall within the exception contained in the latter part of this section, namely, "except . . . for use in connection with or as incident to some business other than such keeping or storing." This exception would seem to be intended to cover such cases as where oil, for example, is kept to lubricate machinery in a factory manufacturing articles not specified in this section, or paper or twine which is kept to wrap merchandise in a store not dealing in said articles.

I am fortified in this opinion by the fact that the law in question would be practically emasculated by a different interpretation, as its operation would be restricted to storage warehouses in which rarely, if ever, four or more persons are employed above the second story.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Insane Hospitals — Power to discharge from — Support of Inmates of Feeble-minded Schools.

Under St. 1909, c. 504, § 76, the superintendent of a State hospital for the insane, when authorized by the trustees of such hospital or of the State Board of Insanity, may discharge any person committed to such hospital for observation under section 43 unless some limitation to the contrary has been placed on the commitment by the judge.

The trustees of such an institution may receive into its schools feeble-minded persons without certification, as provided by St. 1909, c. 504, § 64, as amended by Gen. St. 1916, c. 22, § 2, and without liability for their support, as provided by St. 1909, c. 504, § 82.

SEPT. 12, 1916.

Commission on Mental Diseases.

GENTLEMEN: — The State Board of Insanity requested my opinion on the following questions, as to which I am informed answers are desired by the present commission.

1. Has the superintendent of a State hospital for the insane or the Commission on Mental Diseases ordinary powers of discharge with reference to persons committed for observation under the provisions of St. 1909, c. 504, § 43?

That section is as follows: —

If a person is found by two physicians, qualified as provided in section thirty-two, to be in such mental condition that his commitment to a hospital for the insane is necessary for his proper care or observation, he may be committed by any of the judges mentioned in section twenty-nine to a state hospital for the insane or to the McLean Hospital, under such limitations as the judge may direct, pending the determination of his insanity.

Section 76 of said chapter provides: —

The superintendent or manager of a private institution or receptacle described in section seven, the superintendent of such a state institution and of the McLean Hospital, when authorized thereto by the board of trustees of such institution, or the trustees, or the state board of insanity, or on an application in writing, a judge of probate for the county in which the institution is situated, or in which the inmate had his residence at the time of his commitment or admission, or a justice of the supreme judicial court in any county, after such notice as the said superintendent, manager, trustees, state board, judge or justice may consider reasonable and proper, may discharge any inmate if it appears that he will be sufficiently provided for by himself, his guardian, relatives or friends, or that his detention therein is no longer necessary for his own welfare or the safety of the public. If the legal or natural guardian or any relative of an inmate opposes such discharge, it shall not be made by a superintendent, manager or board of trustees without written notice having been given to the person opposing such discharge. The provisions of this section shall not apply to persons committed by a court.

The provisions of section 76 are unlimited in terms except for the last sentence, — "The provisions of this section shall not apply to persons committed by a court." It is to be

noted that ordinary commitments provided for in section 29 of said chapter are made by certain specified judges rather than by the court. Persons under indictment or acquitted of murder by reason of insanity are committed under the provisions of sections 103 and 104 by "the court." While in most cases the action by a judge would be action by the court, in view of the language of these sections I am of the opinion that the last sentence of section 76, quoted above, does not relate to ordinary commitments made under section 29.

This being so, there seems to be no more reason for excluding from the operation of section 76 commitments made for the purpose of observation, under section 43, than for more permanent commitments made under section 29. It is to be observed that the commitments under section 43 may be made "under such limitations as the judge may direct," and that if the committing judge should in his order place some limitation upon the time within which discharge was to be granted, in my opinion such limitation should be complied with; but apart from any such limitation, I am of the opinion that the powers of the superintendent and of the Commission on Mental Diseases, under section 76, apply to commitments made under section 43.

2. Have the trustees of the Massachusetts School for the Feeble-Minded and the Wrentham State School authority to receive persons into the schools without certification as feeble-minded persons, as provided in section 64 of chapter 504 of the Acts of 1909, and may such persons be received without liability for support, as provided by section 82 of said chapter?

Section 64, as amended by section 2 of chapter 122 of the General Acts of 1916, is as follows: —

The trustees of said institutions may at their discretion receive, maintain and educate in the school department, any feeble-minded person from this commonwealth, gratuitously or otherwise, upon application being made therefor by the parent or guardian of such person, which application shall be accompanied by the certificate of a physician, qualified as provided in section thirty-two, that such person is deficient in mental ability, and that in the opinion of the physician he is a fit subject for said school. A physician who makes the said certificate shall have examined the alleged feeble-minded person within five days of his signing and making oath to the certificate, and such medical certificate shall be void if the person certified to be feeble-minded shall not be received at the school to which he

is committed within thirty days after the date thereof. Special pupils may be received from any other state or province at a charge of not less than three hundred dollars a year. The trustees may also at their discretion receive, maintain and educate in the school department other feeble-minded persons, gratuitously or upon such terms as they may determine.

Said section 82 provides: —

The price for the support of inmates, other than state charges, of the institutions mentioned in section fourteen, and of the Massachusetts School for the Feeble-Minded, shall be determined by the trustees of the respective institutions. The price for the support of state charges shall be determined by the state board of insanity at a sum not exceeding five dollars per week for each person, and may be recovered by the treasurer and receiver general from such persons if of sufficient ability, or from any person or kindred bound by law to maintain them. The attorney-general shall upon request of the said board bring action therefor in the name of the treasurer and receiver general.

It is to be noted that until the codification of the laws relating to insane persons, made by St. 1909, c. 504, the right of recovery for the support of inmates of the Massachusetts School for the Feeble-Minded was limited to inmates "in the custodial department" (R. L., c. 87, § 120), while the provision as to admission of inmates (§ 117) contained the same sentence as the present law, — "The trustees may also at their discretion receive, maintain and educate in the school department other feeble-minded persons, gratuitously or upon such terms as they may determine."

Although the provisions of section 82 are quite general in their nature, it is obvious that if the State is to recover payment for all persons supported at its expense the maintenance and education of any person will not be gratuitous, and yet it is expressly provided that the trustees may at their discretion maintain and educate other feeble-minded persons gratuitously or upon such terms as they may determine. Inasmuch as this provision was allowed to remain in the statute, I am of the opinion that it was the intention of the Legislature to permit such action by the trustees to continue without subjecting persons to the liability prescribed by section 82, if they should see fit to do so. The trustees, in my opinion, may determine to admit such persons gratuitously or as State charges or upon

agreement with certain persons for payment of certain amounts, or any other terms they may determine upon.

Accordingly, I am of opinion that this question is to be answered in the affirmative.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Inspection of Boilers — Collection of Fee for.

The fee imposed by St. 1907, c. 465, § 14, as amended by St. 1912, c. 531, § 5, for the inspection of boilers, may be recovered in an action of contract brought by the inspector against the owner or user of such boiler.

SEPT. 15, 1916.

JOHN H. PLUNKETT, Esq., *Chief of the District Police.*

DEAR SIR: — You request my opinion upon the question of what process, if any, may be used to collect the fee provided by law for inspection of boilers. St. 1907, c. 465, § 14, as amended by St. 1912, c. 531, § 5, provides as follows: —

> The owner or user of a boiler inspected by the boiler inspection department shall pay to the inspector five dollars for each boiler internally and externally inspected, and two dollars for each visit for external inspection under steam, and two dollars for each cast-iron sectional boiler inspected. . . .

Section 28 of said act provides for prosecution of persons violating any of the provisions of this act and for punishment by fine or imprisonment, but no provision is made in the act for the recovery of the fee itself.

The law is well settled that when a duty is imposed upon a person by statute there is an implied promise on the part of such person to perform that duty. *Bath* v. *Freeport*, 5 Mass. 325. I am of the opinion, therefore, that since the statute does not point out any particular remedy to be pursued for the recovery of this fee, it may be recovered in an action of contract brought by the inspector against the owner or user of the boiler or boilers inspected.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Workmen's Compensation Act — Applicability to Commonwealth.

Laborers, workmen and mechanics in the employ of the Commonwealth are not deprived of the benefits of the workmen's compensation act by Gen. St. 1916, c. 307.

SEPT. 15, 1916.

Metropolitan Water and Sewerage Board.

GENTLEMEN: — You request my opinion upon the question of whether or not laborers, workmen and mechanics in the employ of the Commonwealth are deprived of the benefits of the workmen's compensation act by Gen. St. 1916, c. 307. Chapter 307 is as follows: —

SECTION 1. Section seven of chapter eight hundred and seven of the acts of the year nineteen hundred and thirteen is hereby amended by inserting after the word "persons", in the fourth line, the words: — in public employments, — so as to read as follows: — *Section 7.* The provisions of chapter seven hundred and fifty-one of the acts of the year nineteen hundred and eleven, and acts in amendment thereof and in addition thereto, shall not apply to any persons in public employments other than laborers, workmen and mechanics employed by counties, cities, towns, or districts having the power of taxation.

SECTION 2. This act shall take effect upon its passage.

It is significant to note that the omission of the Commonwealth was not a variation of St. 1913, c. 807, as the original act, in section 7, made the same omission, so that the answer to your question depends upon the interpretation of St. 1913, c. 807, § 7.

Our courts have laid down the rule that if the general meaning and object of a statute should be inconsistent with the literal import of any particular clause or section, such clause or section must, if possible, be construed according to the spirit of the act, and that it is proper to consider the whole of a statute and the probable intention of the Legislature in order to ascertain the meaning of any particular section; and this mode of interpretation is justifiable even where the words of the section itself are unambiguous. *Holbrook* v. *Holbrook*, 1 Pick. 248.

St. 1913, c. 807, § 1, provides that the Commonwealth shall, and any county, city, town or district having the power of taxation may, pay to laborers, workmen and mechanics the

compensation which had theretofore been provided as to private employments. Sections 2 and 5 of this act also provide for procedure as to the Commonwealth. Section 6 provides that this act shall apply to all laborers, workmen and mechanics in the service of the Commonwealth, or of a county, city, town or district having the power of taxation. To hold that the provisions of section 7 of this act exclude the Commonwealth from the operation of this chapter would create a repugnancy in the act itself which the Legislature could not have intended.

The amendment of this section by Gen. St. 1916, c. 307, above quoted, does not, in my opinion, change the meaning of the act as applied to the Commonwealth. The amendment consisted merely in the insertion of the words "in public employments," and was undoubtedly intended only to remove any possible question as to whether the general compensation act had been repealed by section 7 of said chapter 307.

Accordingly, I am of the opinion that the answer to your question must be in the negative.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Cape Cod Canal — Jurisdiction of Joint Board — Jurisdiction of Public Service Commission — Safety Appliances — Completion of Canal.

The jurisdiction of the Joint Board created by St. 1899, c. 448, § 6, to order the erection or installation of structures and appliances for the protection and use of the Cape Cod Canal, whatever its extent, was not a continuing one, but ended upon the original approval by it, as provided in that section, of the plans for the construction of the canal. St. 1910, c. 519, gave no additional authority in that regard.

The Public Service Commission, under the provisions of St. 1913, c. 784, now has exclusive jurisdiction of the regulation of the operation of the canal, and it alone is authorized to determine the equipment and appliances required for its safe operation.

Under the clause of the contract for the construction of the Cape Cod Canal, providing for the construction of tidal gates by the contractor "if at the expiration of one year after the canal is opened to the public use" the Joint Board is satisfied that such gates should be constructed for the safe and suitable use of the canal, the Joint Board is authorized to make its determination within a reasonable time after the canal has been constructed to its full size and opened to public use for one year.

The Joint Board may issue its final certificate of the completion of the canal under St. 1900, c. 476, § 1, in the event that variations have been made in its construction from the plans originally approved by the Harbor and Land Commissioners under St. 1899, c. 448, § 4, only in case that it finds as a matter of fact that such changes are merely incidental and not matters of substance, or are required by the establishment of points of crossing under the provisions of section 6 of that statute, and that they do not change the general scheme or character of the canal approved by the Harbor and Land Commissioners.

The regulation of the use of the draw in the railroad bridge over the canal is now entirely within the jurisdiction of the Public Service Commission, and that of the draw in the highway bridges is within the jurisdiction of the county commissioners of the county of Barnstable.

Sept. 19, 1916.

Hon. William S. McNary, *Chairman, Joint Board consisting of the Public Service Commissioners and the Harbor and Land Commissioners.*

Dear Sir: — I beg to acknowledge the request of the Joint Board for my opinion concerning certain questions which have arisen in regard to the construction and the operation of the Cape Cod Canal. Since the date of your request the Board of Harbor and Land Commissioners has been abolished by chapter 288 of the General Acts of 1916, and its duties and powers transferred to the Commission on Waterways and Public Lands. Consequently, references made in this opinion to the Harbor and Land Commissioners must be interpreted as references to the new commission so far as future action is concerned.

In an opinion which I addressed to your Board on July 22, 1915, I stated with some fullness certain important provisions of the statutes under which this canal is being constructed, and certain important provisions in the contract between the Boston, Cape Cod & New York Canal Company, hereafter referred to as the "Canal Company," and the Cape Cod Construction Company, hereafter referred to as the "Construction Company." I refer you to this discussion without now repeating it. Your questions, however, require that certain provisions of the statutes with reference to the jurisdiction of your Board and that of other boards concerned with the canal should be stated more fully.

Chapter 448 of the Acts of 1899, as amended by chapter 476 of the Acts of 1900, committed to the determination of the Joint Board two general questions. The first of those questions was purely a financial one. At the time of the en-

actment of the statute of 1899 there appears to have been no board or other tribunal in the Commonwealth which had jurisdiction over canal companies similar to that then exercised by the Railroad Commissioners over railroads and railways. Accordingly, by section 2 of that statute the Joint Board created by section 6 of the statute was given a similar control over the issue of stock and bonds by the Canal Company as the Railroad Commissioners then exercised over the issue of stock and bonds by railroads and railways. The obvious purpose of this provision was to prevent the issue of securities by the Canal Company to an unreasonable or excessive amount or without adequate property behind them. By the amendment to this section, made by section 1 of chapter 476 of the Acts of 1900, the supervision over the issue of stock and bonds by the Canal Company given to the Joint Board was extended, and it was provided that, if the Canal Company entered into a contract to pay for the construction of the canal by the issue of its stock and bonds, such a contract should be subject to the approval of the Joint Board, and that the company should issue stock and bonds from time to time under such contract only upon the certification of the Joint Board that the work and materials for which such securities were being issued had actually been done or furnished in accordance with the contract.

These provisions of the statute give to the Joint Board no authority whatever over the manner in which the canal is to be constructed or equipped. The Canal Company is authorized by the statute, as pointed out in the previous opinion, to construct the canal in accordance with plans approved by the Harbor and Land Commissioners. The only authority of the Joint Board, under the provisions of section 2, is, first, to approve the form of contract in case a contract is made by which stock and bonds are to be issued in payment for the construction of the canal, and then to determine from time to time, as the work progresses, whether the Canal Company may issue stock and bonds in payment for a given *pro rata* amount of the work provided for in the contract.

Section 6 of the act of 1899 is as follows: —

> The canal company, within one month after the approval of its plans by the board of harbor and land commissioners, may apply to the boards of railroad commissioners and of harbor and land commissioners, who for the purposes hereinafter stated are constituted a

joint board, to determine at what point or points the railroad of the Old Colony Railroad Company shall cross said canal by a drawbridge or bridges, or by a tunnel or tunnels constructed under said canal. Said joint board thereupon, after notice to the Old Colony Railroad Company and to all other parties interested, which notice shall be given in such form as said joint board shall direct, shall determine said questions, and the decision of a majority of said joint board shall be final. Said canal company shall construct its canal with such structures and appliances for its protection and use as said joint board may order, together with such bridge or bridges, tunnel or tunnels, ferries, and changes of highways, under the supervision of said joint board, as shall be in accordance with plans approved by them and in conformity with such orders as they may make; and the supreme judicial court shall have jurisdiction in equity to enforce such orders.

Plainly, the first part of this section commits to the determination of the Joint Board but one question, namely, at what point or points shall the railroad of the Old Colony Railroad Company cross the canal, and what shall be the form of crossing. Before making this determination the Joint Board, on March 14, 1901, requested the opinion of Attorney-General Knowlton as to whether, in view of the fact that the Harbor and Land Commissioners had approved plans for the construction of a canal without requiring locks or tidal gates, the Joint Board then had authority to require the erection of such locks or tidal gates for the protection and use of the canal. On April 6, 1901 (II. Op. Atty.-Gen. 257), he in substance advised the Joint Board that the only question referred to that Board by section 6 concerned the points at which and the manner in which the railroad should cross the canal, and that it had no jurisdiction over matters of the construction of the canal, such as the question of locks, except so far as such matters should be incidental to the protection and maintenance of the crossings which came within the jurisdiction of the Board.

In *Bourne* v. *Joint Board of Commissioners*, 221 Mass. 293, the Supreme Judicial Court held that the general provisions of section 6 must be read into and in connection with section 14 of the same statute, and that therefore after the county commissioners for the county of Barnstable, under section 14, had designated the points at which public highways should cross the canal, the Joint Board was authorized to determine in each instance whether such crossing should be by bridge, tunnel or ferry. It was expressly decided that the establish-

ment of a temporary ferry was within the power of the Joint Board.

Section 1 of chapter 519 of the Acts of 1910 is as follows: —

> The joint board mentioned in chapter four hundred and forty-eight of the acts of the year eighteen hundred and ninety-nine, entitled "An Act to incorporate the Boston, Cape Cod and New York Canal Company," shall have power from time to time, upon such terms as shall seem proper, to change the point or points, as previously determined by the joint board, at which the railroad of the Old Colony Railroad Company shall cross the said canal as provided in section six of the said act, and to vary any previous order of the joint board determining the said point or points; and when said joint board has considered and determined a method of crossing the canal suitable for railroad or highway traffic at certain designated points as provided in said act, the power and authority of said joint board shall not thereby be limited or exhausted, and it may thereafter under the provisions of said act consider and determine the method of crossing at other points of crossing for highway traffic, in the method provided in said act.

It is to be noted that this section applies only to the determination of the point or points at which the railroad shall cross the canal, and to the determination of the method of the crossing of the canal by highways. It in no way refers to any authority in the Joint Board to require structures or appliances for the protection or use of the canal.

I do not deem it necessary for me now to review the opinion given by Attorney-General Knowlton, or to determine whether, in connection with its original action under section 6, the Joint Board would have had authority to require the erection of locks or tidal gates or any other appliances for the protection and use of the canal aside from the protection of the crossings. In my opinion, until the enactment of the statute of 1910 just quoted, the authority given the Joint Board by section 6 was not a continuing one, and its duty under that section was entirely completed when it first approved the plans in accordance with the provisions of that section. With that approval, and until the enactment of the statute of 1910 extending its jurisdiction, in my opinion the Joint Board had no further authority under section 6. As already stated, the statute of 1910 gave to the Board no authority to order structures and appliances for the protection and use of the canal.

Any uncertainty that may exist as to the extent of the jurisdiction of the Joint Board to order structures and appliances under section 6 are made immaterial, so far as present conditions are concerned, by the provisions of chapter 784 of the Acts of 1913 establishing the Public Service Commission and creating its jurisdiction. Section 2 of that statute gave to this commission "general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth, and all persons, firms, corporations, associations and joint stock associations or companies, hereinafter in this act collectively called common carriers and severally called a common carrier, furnishing or rendering any such service or services. . . ." Among the services specified was the following: —

The operation of all conveniences, appliances, facilities or equipment utilized in connection with, or appertaining to, such transportation or carriage of persons or property or such express service or car service, by whomsoever owned or by whomsoever provided, whether the service be common carriage or merely in facilitation of common carriage.

Section 23 provides, in part, as follows: —

Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances or service of any common carrier, now or hereafter subject to its jurisdiction, are unjust, unreasonable, unsafe, improper or inadequate, the commission shall determine the just, reasonable, safe, adequate and proper regulations and practices, thereafter to be in force and to be observed, and the equipment, appliances and service thereafter to be used and shall fix and prescribe the same by order to be served upon every common carrier to be bound thereby.

Section 29, with certain exceptions not now material, repealed "all acts and parts of acts inconsistent with any provision of this act, and all acts and parts of acts which would in any way limit or prevent the exercise to the fullest extent of any of the jurisdiction, powers, authority or discretion delegated herein to the commission." In my opinion these provisions of the Public Service Commission act give to that commission exclusive jurisdiction over the operation of the canal, and authorize it alone to determine the nature and character of

the equipment and appliances now required for the safe operation of the canal.

In the foregoing discussion I have stated all the matters which have been committed to the jurisdiction of the Joint Board by the statutes of the Commonwealth. One further matter must be noted. The specifications of the contract between the Construction Company and the Canal Company approved by the Joint Board contained the following provision: —

> If at the expiration of one year after the canal is opened to public use it shall have been proved to the satisfaction of the Joint Board that a lock, tidal gates or some other device for controlling the current in the canal should be constructed in order to provide for the safe and suitable use of the canal by the public, then the contractor shall construct such lock, tidal gates or other device satisfactory to the Joint Board, and the same shall be considered as additional work and be subject to the provisions of the fifth paragraph of the contract as regards payment therefor.

As I stated in my previous opinion to your Board, doubtless by approving a contract containing this provision the Board accepted the duty thereby imposed upon it, or, in any event, it is proper for the Board, in the public interest, to undertake the performance of such duty. It is to be noted, however, that in performing this duty the Board is not acting under any statute, and has no authority by law to enforce its decision. It is merely appointed by the contract an arbitrator between the parties, and stands in reference to the parties in much the same relation as does an engineer or an architect in the ordinary construction contract. If, acting under this provision, the Board determines tidal gates or similar devices to be necessary, the Construction Company has the right to erect them, under the provisions of the contract, and then will be entitled to receive pay therefor from the Canal Company as additional work. If the Construction Company declines to erect them, the Canal Company will have a right of action against it for breach of contract. In the event, however, that the Construction Company and the Canal Company by mutual agreement should determine that this provision of the contract need not be performed, I know of no provision of law by which the Joint Board could compel its performance.

With this discussion I proceed to deal with your specific questions.

1. Your first question in substance requests me to interpret that portion of the language of the specifications with reference to locks or tidal gates which reads as follows: "If at the expiration of one year after the canal is opened to public use."

In my opinion this provision contemplates that after the canal has been constructed to the depth and width required by the contract and by section 3 of the act of 1899, and as thus constructed has been opened to public use for a period of one year, the Joint Board is then authorized to undertake the investigation and determination of the question of the advisability of tidal gates. In my opinion it is not necessary that every part of the work covered by the contract for the construction of the canal must be completed before the year begins to run. It is merely required that the canal be constructed to its full size, and that it be given a trial by public use for one year before this question shall be determined. Accordingly, in my opinion the Joint Board cannot determine that the canal was legally "opened to public use," within the meaning of this provision, before it had been constructed to the depth and width required by the statute, but it may determine, and on the facts stated to me should determine, that the canal was thus opened to public use before the Board has certified to its entire completion. In my opinion the words "at the expiration of one year" are used to postpone this determination until after the expiration of a year of use. To limit the time of action by the Joint Board under this provision of the specifications to precisely the last day of the year, as is suggested by your question as a possibility, is, in my opinion, to give to this provision of the specifications an absurd construction which would practically nullify it. A failure to make a determination within a reasonable time after the expiration of the year would be tantamount to a determination that a lock or other device was unnecessary.

2. Your second question is as follows: —

Can the Joint Board under the statutes relating to the Cape Cod Canal, and under the contract between the Canal Company and the Construction Company, require the building of a lock in the canal, if determined by the Joint Board to be necessary for the "safe and suitable use of the canal by the public," or for the "protection and use" of the canal or of the railroad and highway bridges crossing it?

As I have already pointed out, the Joint Board no longer has, if it ever did have, any jurisdiction to require the Canal Company to erect structures or appliances for the safe and suitable use of the canal by the public or for the protection and use of the canal. Jurisdiction over this matter, in my opinion, now rests with the Public Service Commission. I interpret your question, so far as it refers to railway and highway bridges crossing the canal, to refer only to bridges now existing. In my opinion your Board fully exercised all jurisdiction committed to it by section 6 of the act of 1899, with reference to these bridges, when it approved the plans for the construction of the canal and the location and character of these crossings under the provisions of that section. Accordingly, as I interpret your question I answer it in the negative.

3. Your third question is as follows: —

Can either the Joint Board or the Board of Harbor and Land Commissioners, under the statutes relating to the Cape Cod Canal, and under the contract between the Canal Company and the Construction Company, either with or without the consent of the Canal Company —

(*a*) Allow or require the elimination of passing places in the canal, called for by the plans of the construction thereof approved by the Board of Harbor and Land Commissioners and accepted by the Canal Company and called for by the contract and specifications between the Canal Company and the Construction Company approved by the Joint Board?

(*b*) Or allow or require the relocation and construction of such passing places?

(*c*) Or accept or require in lieu of a strict conformity with the plans for such passing places an enlargement by the Canal Company and Construction Company of the cross-section of the canal representing an equivalent amount of dredging and material excavated?

If so, what action in either case by either or both boards is necessary or advisable for that purpose?

The statutes under consideration contain no provisions for the changing of the contract or the plans for the construction of a canal after they have once been approved. The contract itself contains the provisions for the performance of work in addition to that expressly specified, but makes no provision for the omission of any of the work described by the plans and specifications. These plans and specifications were ap-

proved by the Harbor and Land Commissioners and accepted by the Canal Company. It thereupon was authorized to construct a canal in accordance therewith. It entered upon that work, and therefore it became its duty to construct the canal in substantial compliance with those plans and specifications. The only duty imposed upon the Joint Board by the statutes and by the contract is to determine upon requisitions approved by the engineer whether the work covered by such requisitions "has been done, and such materials furnished in accordance with the contract," and to so certify. (Contract, paragraph 3.)

Paragraph 13 of the contract recognizes that "in a work of this magnitude it is impossible either to show in advance all details or to forecast precisely all exigencies." Accordingly, it is declared that "the said specifications and plans are to be taken, therefore, as indicating the kind of work, its nature and method of construction, so far as the same are now distinctly apprehended." It was then provided, in substance, that the obligation of the contractor was to complete the construction and equipment of the canal according to best rules and usages of canal construction, even though not expressly specified. These provisions seem to me to contemplate that there may arise from time to time, during the work of constructing the canal, occasion to make various incidental changes in the details of the work to be performed. These changes, however, are not to be substantial changes in the general plan of the canal as approved by the Harbor and Land Commissioners, and are not to change the general scheme which that Board has approved. Such incidental changes are matters of perfecting the canal as planned and approved, and do not contemplate the reducing of the amount of work covered by the contract or the elimination of any substantial features of the work.

Furthermore, certain changes in the original plans as approved by the Harbor and Land Commissioners may be incidental to or may be required by the location and the form of the crossings of the canal by the railroad and the highways. The determination of these matters is committed by the statute to the Joint Board in the case of the railroad crossings, and to the county commissioners as to location, and to the Joint Board as to form in the case of the highway crossings. In my opinion the statute contemplates such

changes in the approved plans as are required by or are reasonably incidental to a compliance with orders made by these Boards in this connection.

I find no provision in the statutes authorizing the Harbor and Land Commissioners to approve any changes in the plans for the construction of the canal after they have once approved the plans. In my opinion, after they have once approved the plans under section 4 of the act of 1899, they have no further jurisdiction over the matter.

The Joint Board has no jurisdiction over the matter raised by your question except so far as it is involved in the certification by it that work covered by various requisitions has been completed in accordance with the contract. Its sole duty in this respect is to determine whether the work which it is asked to certify has been done in accordance with the contract. In making this determination it is the duty of the Board to determine whether any variations which it finds from the plans and specifications are merely incidental changes or are changes of the character which I have outlined, and are thus contemplated by the statutes and the contract. If such changes are purely incidental, not matters of substance, or if they are incidental to or required by duly established points of crossing, the Joint Board may disregard them in certifying the work, but not otherwise.

Thus your inquiry may involve various questions of fact. I am informed that the omission of one of the passing places shown upon the plans approved by the Harbor and Land Commissioners was made necessary by the construction of the Sagamore bridge, in pursuance of the direction of the county commissioners and of the Joint Board, at the point where the passing place was originally planned. I am further informed that in the opinion of the chief engineer of the Construction Company and other engineering authorities this omission made it necessary as a practical matter to rearrange the location of all the passing places and, because of the shortness and character of the canal, to adopt an entirely new scheme of passing places. Thereupon, I am told, it was determined, with the approval of the engineer of the Joint Board, to construct passing places or enlargements of the canal at each end of it. I understand that this was in fact done, and that it involved at least as much excavation as the passing places originally planned.

I do not attempt to pass upon the questions of fact thus raised. They come within the province of your Board. If, upon consideration of the facts and the opinions of the engineers, you conclude that the adoption of a new scheme of passing places was made a practical necessity by the location and construction of the Sagamore bridge under the orders of the county commissioners and your Board, and that the scheme of passing places adopted was a fair and reasonable substitute for those originally planned, in my opinion you may in that event certify that the canal has been completed in accordance with the contract, notwithstanding the failure to construct the passing places shown on the plans approved by the Harbor and Land Commissioners. Unless you reach such a conclusion, in my opinion you are not now warranted in issuing your final certificate.

4. Your fourth question is as follows: —

Can the Joint Board, under the statutes relating to the Cape Cod Canal, and under the contract between the Canal Company and the Construction Company, either with or without the consent of the Canal Company, require the construction of a similar passing place at another point in the canal in substitution for the passing place not constructed as called for by the plans of construction approved by the Board of Harbor and Land Commissioners and by the contract and specifications between the Canal Company and the Construction Company approved by the Joint Board which was to be at the point since designated by the county commissioners of Barnstable County for and now occupied by the Sagamore bridge, built in accordance with plans approved by the Joint Board?

My answer to the preceding question fully answers this question.

5. Your fifth question is as follows: —

Can the Joint Board, under the statutes relating to the Cape Cod Canal, and under the contract between the Canal Company and the Construction Company, either with or without the consent of the Canal Company, in lieu of a strict conformity with the contract between the Canal Company and the Construction Company requiring the Construction Company to turn over to the Canal Company a dredging plant with a view to its maintenance by the latter company for the operation of its canal, accept an agreement on the part of the Canal Company to contract for doing the necessary dredging, or allow, in certifying requisitions for payments under the contract and

approving stock and bond issues by the Canal Company, a claim of the Construction Company for extra labor and materials furnished for the construction of the canal to be offset against the obligation of the Construction Company to turn over such dredging plant?

In my opinion the turning over to the Canal Company by the Construction Company of a dredging plant is a mere incidental matter in connection with the performance of the contract between these corporations. If the Joint Board is satisfied that the Canal Company has made suitable arrangements for dredging the canal from time to time during the course of its maintenance and operation, I see no reason why it should not certify the completion of the work covered by the contract, even though this dredging plant is not thus turned over. If, as a result of this or other similar incidental omissions in the work specified by the contract, stock or bonds of the Canal Company remain unissued after all work covered by the contract has been paid for, I see no reason why the Joint Board, under paragraph 5 of the contract, should not certify additional work to be paid for by the use of such unissued stock and bonds.

6. Your sixth question is as follows: —

Can the Joint Board, under the statutes relating to the Cape Cod Canal, and under the contract between the Canal Company and the Construction Company, require the building of a basin or enlargement of the width of the canal with bulkheading between the Bourne highway bridge and the New York, New Haven & Hartford railroad bridge, if determined by the Joint Board to be necessary for the protection and use of the canal or of the railroad and highway bridges crossing it?

In view of the principles which I have already laid down, I must answer this question in the negative. Jurisdiction over such matters, if it exists anywhere, is now in the Public Service Commission.

7. Your seventh question in substance asks my opinion as to what board or boards, if any, have authority to regulate the draw in the railroad bridge crossing the canal, and also the draws in any highway bridges crossing the canal.

In my opinion the regulation of the use of the draw in the railroad bridge is now entirely a matter within the jurisdiction of the Public Service Commission.

Section 14 of the act of 1899 provides, in part, as follows: —

Said canal company shall provide and maintain in the towns of Bourne and Sandwich, at such points as may be designated by the county commissioners, suitable ferries or bridges across the canal, or a suitable tunnel or tunnels under the same, for passengers and vehicles, to be operated free from tolls, *under reasonable rules to be established by the county commissioners*, except that the canal company shall not be required to maintain a ferry if a highway, bridge or tunnel shall be built at or near any of said points. . . .

In my opinion, under the authority to establish reasonable rules granted to the county commissioners by the foregoing provision, they have the right to regulate the use of draws in any of the highway bridges crossing the canal. So far as this canal is concerned, this provision, in my opinion, supersedes the general authority granted by R. L., c. 52, § 26, to cities and towns to make ordinances or by-laws regulating the passage of vessels through drawbridges.

8. Your eighth question refers to the fact that the Canal Company, in pursuance with an order of your Board, has established a temporary ferry at a point in the village of Bournedale designated by the county commissioners; that on May 11, last, your Board determined that a passenger and vehicular ferry should be the permanent means of crossing the canal at this point, and that the time for the completion of this ferry has been extended by your Board to July 1, 1917. You then inquire: —

Can the canal be regarded as completed, or can the Joint Board certify that 100 per cent. of the total amount of labor to be performed and material to be furnished under the contract and specifications between the Canal Company and the Construction Company approved by the Joint Board June 3, 1907, has been performed and furnished —

(*a*) Before the vehicular and passenger ferry described in the last two mentioned votes has been installed by the Canal Company?

(*b*) Before the passing places in the canal, called for by the plans of the construction thereof approved by the Board of Harbor and Land Commissioners and called for by the contract and specifications between the Canal Company and the Construction Company, have been constructed or before the dredging plant called for by said contract has been turned over to the Canal Company by the Construction Company?

(*c*) Prior to the installation of a lock or basin or the enlargement of the width of the canal, should these or any of them be subsequently ordered by the Joint Board?

The specifications of the contract for the construction of the canal (p. 27), after referring to certain contemplated highway crossings of the canal, provide: —

> The contractor shall allow the sum of $75,000 for such crossings and in case the cost thereof shall be more or less than the said sum, after allowing 10 per cent. for the contractor's profits, a proper allowance shall be made for the same by or to the contractor.

Accordingly, in my opinion the canal can be regarded as completed in accordance with the contract, for the purpose of full certification by the Joint Board of all the stock and bonds to be issued under the contract in payment for the performance of the contract, before the ferry described in your question has been installed, only in the event that the sum of $75,000 has already been expended by the Canal Company for highway crossings. In that event, the expense of installing the ferry becomes additional work under the contract, but not otherwise. Subdivision (*b*) of your question is answered by my answer to your third question. In answer to subdivision (*c*) of your question, it is plain from my previous opinion to your Board that the installation of a lock or tidal gate would be additional work not covered by the contract, and therefore is not to be considered in certifying the performance of the contract. The matter of the installation of the basin or enlargement of the canal, to which you refer, has already been fully discussed in answering your third question.

9. Your ninth question is as follows: —

> Upon the completion of the canal does the jurisdiction or authority of the Joint Board in relation to said canal expire by limitation?

Section 1 of chapter 519 of the Acts of 1910, already referred to, plainly requires a negative answer to this question.

10. Your tenth question is as follows: —

> Section 3 of chapter 448 of the Acts of 1899 provides that said canal when completed shall be under the jurisdiction of the Harbor and Land Commissioners. What is the nature and extent of the authority and jurisdiction of said commissioners in regard to the canal under this provision?

In view of the provisions of the Public Service Commission act already quoted it is a grave question whether the Harbor and Land Commissioners any longer have any jurisdiction in regard to the canal, under the section to which you refer. Your question is too broad a one to deal with at the present time. I prefer to leave its consideration until some case has arisen in connection with which the successor of that Board desires my advice as to its jurisdiction.

11. Your eleventh question is as follows: —

Section 1 of chapter 448 of the Acts of 1899 provides that the Boston, Cape Cod & New York Canal Company is incorporated "with all the privileges and subject to all the duties, restrictions and liabilities set forth in all general laws which now are or may hereafter be in force relating to railroad corporations, so far as they are applicable, except as hereinafter provided." Under this provision of the statute, what is the nature and extent of the authority and jurisdiction of the Public Service Commission in regard to the canal?

Since the enactment of the Public Service Commission act, particularly those provisions to which I have referred, the effect of the language of section 1 of the act of 1899, which you quote, has become unimportant. The Public Service Commission, in my opinion, has exclusive jurisdiction over the Canal Company to the extent granted by the Public Service Commission act. The extent and limitations of this jurisdiction must be left to be determined from time to time as specific questions arise under it requiring a determination by the Public Service Commission.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Automobiles — Registration — "Owner."

Where an automobile has been sold under a conditional sale agreement whereby the vendor retains title for the purpose of security, the conditional vendee who has rightful possession is the owner within the meaning of St. 1909, c. 534, § 2, providing for the registration of motor vehicles by the owners thereof.

SEPT. 20, 1916.

Massachusetts Highway Commission.

GENTLEMEN: — You request my opinion upon the question of whether an automobile which has been sold under a con-

ditional sale agreement whereby the vendor retains title for the purpose of security should be registered in the name of the conditional vendor or the conditional vendee.

St. 1909, c. 534, § 2, provides that —

> Application for the registration of motor vehicles may be made by the owner thereof. . . .

Section 9 of this chapter provides, in part, as follows: —

> No motor vehicles shall be operated after midnight on the thirty-first day of December in the year nineteen hundred and nine unless registered in accordance with the provisions of this act. . . .

The answer to your question depends upon what interpretation should be given to the word "owner," as used in this statute.

I beg to advise that I am of the opinion that the conditional vendee of an automobile is to be regarded as coming within the term "owner" so long as he is in rightful possession of such vehicle. In arriving at this conclusion I am influenced by the following considerations: —

1. The conditional vendee under such a sale, while not the holder of the legal title, is, nevertheless, the owner of a certain property in the article sold. As was said by the court in the case of *Keith* v. *Maguire*, 170 Mass. 210: —

> The word "owner" is not a technical term. It is not confined to the person who has the absolute right in a chattel, but also applies to the person who has the possession and control of it. Thus it has been said in this Commonwealth, in *Hartford* v. *Brady*, 114 Mass. 466, 470, a case under the Gen. Sts., c. 25, § 25 (Pub. Sts., c. 36, § 27), by which the owner of cattle is made liable for injury done by them: "The word 'owner' is intended to include the person in whom is the general property in the animals, while it embraces also those who are in possession of them under a special title, or by virtue of any lien." See also *Wisconsin River Log Driving Association* v. *Comstock Lumber Co.*, 72 Wis. 464; *Hughes* v. *Sutherland*, 7 Q. B. D. 160; *The Queen* v. *St. Marylebone*, 20 Q. B. D. 415; *Lewis* v. *Arnold*, L. R. 10 Q. B. 245; *Dawson* v. *Midland Railway*, L. R. 8 Ex. 8.

There are other cases where the word "owner" has been held to mean the person in possession and control, and not to include the absolute owner. *Camp* v. *Rogers*, 44 Conn. 291; *Caudwell* v. *Hanson*, L. R. 7 Q. B. 55; *Meiklereid* v. *West*, 1 Q. B. D. 428.

2. It is a primary rule of statutory construction that an act must be construed as a whole so as to make the part in question consistent, if possible, with the rest of the chapter. Section 2 of this act provides, in part, as follows: —

> A person who before the first day of August in any year transfers the ownership *or loses possession* of an automobile registered in his name and who applies for the registration of another motor vehicle of less horse power than that of the vehicle so transferred, shall be entitled, upon payment of the proper fees set forth in section twenty-nine, to a rebate equivalent to one-half the difference between the respective fees for the higher and the lower horse powers, and a person under like conditions who does not apply for the registration of another automobile but who on or before the first day of September in the same calendar year files in the office of the commission a written application for a rebate, shall be entitled to a rebate of one-half the fee paid for the registration of such vehicle.

To hold that the word "owner" meant only the owner of the legal title would necessarily involve a result which it cannot be presumed was intended by the Legislature. Under this theory the owner of an automobile, having sold the same under a conditional sale agreement whereby he retained title for the purpose of security, would thereby necessarily lose possession of it, at least until the condition was broken by the vendee, and would seem to be, under the language of the statute last above quoted, entitled to a rebate of one-half the fee of registration if he applied therefor before the first day of September, notwithstanding that he still remained the owner.

For the foregoing reasons I am of the opinion, as above indicated, that in the hypothesis given an automobile may be properly registered in the name of the conditional vendee who has rightful possession thereof.

Yours truly,

HENRY C. ATTWILL, *Attorney-General.*

Militia — National Guard — United States Service — Ability of Officers to act in Dual Capacity.

The militia of the Commonwealth having complied with the provisions of the act of Congress of June 3, 1916, its officers, upon being called into the service of the United States, are subject to the orders and control of the President of the United States while in such service, and in so far as their duties in such service are inconsistent with their duties as officers of that part of the National Guard not called into the service of the United States, the Governor, as Commander-in-Chief of the militia, may appoint others to temporarily serve in their places. Until this is done, however, the acts of such officers are valid when acting in the capacity of State officers.

SEPT. 20, 1916.

His Excellency SAMUEL W. McCALL, *Governor of the Commonwealth.*

SIR: — I beg to acknowledge your communication in which you ask my opinion on the following: —

The chief surgeon, Lieut.-Col. Frank P. Williams, the chief ordnance officer, Maj. Kingsley A. Burnham, Col. W. E. Sweetser, commanding Sixth Regiment Infantry, and a large number of other State officers are now, although in the Commonwealth, on United States duty, subject to the orders of the President under the acts of Congress of Jan. 21, 1903, June 3, 1916, and other acts.

To some extent they are still exercising their duties as State officers, but there is a question as to what authority, if any, I would have over them in case of an emergency arising in the State where their services were required.

Moreover, there may be a question of whether or not various acts, such as issuing orders, acting on State boards, approving bills, etc., are legal.

I therefore request that you furnish me your opinion upon the status of these officers, my authority over them and their right to act as State officers.

Sections 57, 58, 101 and 118 of the act of June 3, 1916, provide as follows: —

SEC. 57. *Composition of the Militia.* — The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia.

Sec. 58. *Composition of the National Guard.* — The National Guard shall consist of the regularly enlisted militia between the ages of eighteen and forty-five years organized, armed, and equipped as hereinafter provided, and of commissioned officers between the ages of twenty-one and sixty-four years.

Sec. 101. *National Guard, when subject to Laws governing Regular Army.* — The National Guard when called as such into the service of the United States shall, from the time they are required by the terms of the call to respond thereto, be subject to the laws and regulations governing the Regular Army, so far as such laws and regulations are applicable to officers and enlisted men whose permanent retention in the military service, either on the active list or on the retired list, is not contemplated by existing law.

Sec. 118. *Necessary Rules and Regulations.* — The President shall make all necessary rules and regulations and issue such orders as may be necessary for the thorough organization, discipline, and government of the militia provided for in this act.

It is apparent that the act of June 3, 1916, entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," was passed by Congress partly for the purpose of centralizing the control over the militia of the various states and territories. Prior to the enactment of this legislation more freedom was given to the states and territories in dealing with their militia, and up to this time the militia was inclined to be considered a state rather than a national organization.

Since the militia of this Commonwealth has complied with the provisions of the act and become a part of the National Guard, as provided by section 58, so much thereof as is at the present time in the service of the United States is subject to the rules and regulations governing the regular army, as provided by section 101. By section 118 the President is given authority "to make all necessary rules and regulations and issue such orders as may be necessary for the thorough organization, discipline, and government of the militia provided for in this act." Subject to such rules, regulations and orders that part of the National Guard not in the service of the United States is subject to the control of the several States.

I am therefore of the opinion that the officers mentioned in your communication who are on United States duty in this Commonwealth are subject to the orders and control of the President of the United States.

In so far as service in the United States is inconsistent with

the performance of their duties as officers of that part of the National Guard not called into the service of the United States, I am of the opinion that such officers cannot properly act as officers of that part of the National Guard. Whenever in your opinion as Commander-in-Chief such officers cannot properly perform their duties as State officers, it is my opinion that you can detail others to serve in their places while they are temporarily in the service of the United States. Until others are detailed in their places, I am of the opinion that acts of officers of the National Guard called into the service of the United States in issuing orders, acting on State boards and approving bills, so long as such acts comply with the laws of the Commonwealth, are legal.

Very respectfully yours,

HENRY C. ATTWILL, *Attorney-General.*

Veterans — Relief of — Liability of Children for Support of.

The relief provided for veterans and their families by R. L., c. 78, § 18, as amended by Gen. St. 1916, c. 116, § 1, is available independently of Gen. St. 1915, c. 163, § 1, imposing a liability upon children of sufficient means to provide for their destitute parents.

SEPT. 26, 1916.

Mr. RICHARD R. FLYNN, *Commissioner of State Aid and Pensions.*

DEAR SIR: — I beg to acknowledge your letter in which you ask my opinion on the following: Whether the provisions of Gen. Sts. 1915, c. 163, relative to the support of destitute parents, extend to cases of parents drawing soldiers' relief under R. L., c. 79, §§ 18 and 19, from cities and towns in this Commonwealth, or has the soldier or widow an independent status or right to receive soldiers' relief, although the children may be able to provide for him or her.

R. L., c. 79, § 18, as amended by Gen. Sts. 1916, c. 116, § 1, provides, in part, as follows: —

If a person who served in the army or navy of the United States in the war of the rebellion and received an honorable discharge from all enlistments therein, and who has a legal settlement in a city or town in the commonwealth, becomes, from any cause except his own criminal or wilful misconduct, poor and entirely or partially unable to provide maintenance for himself, his wife or minor children under the age of sixteen years, or for a dependent father or mother; or if such person dies leaving a widow or such minor children or a dependent father or

mother without proper means of support, such support shall be accorded him or his said dependents as may be necessary by the city or town in which they or any of them have a legal settlement. . . .

R. L., c. 79, § 19, is as follows: —

The mayor and aldermen of a city or the selectmen of a town shall furnish such relief without a vote of the city council or of the town authorizing them thereto. Such relief shall be furnished only by, through or under the agency or direction of city or town officers who are authorized to disburse state or military aid. If the mayor and aldermen or the selectmen fail to furnish it, any person who is aggrieved may apply to the commissioners of state aid, who shall forthwith make a thorough investigation of the qualifications and circumstances of the applicant and shall determine the amount of relief, if any, to be given to him. Their decision shall be final, but may at any time be amended or reversed by them.

Gen. Sts. 1915, c. 163, § 1, provides: —

Any person, above the age of twenty-one years, who, being possessed of sufficient means, unreasonably neglects or refuses to provide for the support and maintenance of his parent, whether father or mother, residing in this commonwealth, when such parent through misfortune and without fault of his own is destitute of means of sustenance and unable by reason of old age, infirmity or illness to support and maintain himself or herself, shall be punished by a fine not exceeding two hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment. No such neglect or refusal shall be deemed unreasonable as to a child who shall not during his or her minority have been reasonably supported by such parent, if the parent was charged with the duty so to do, nor as to any child who, being one of two or more children, has made proper and reasonable contribution toward the support of such destitute parent.

When the Legislature made the provisions for soldiers' relief it is apparent that it intended to provide for the support of the Civil War veteran and his dependents as a reward for the service rendered by him to the Nation in its time of need.

R. L., c. 79, § 18, as amended, and § 19 made it obligatory upon the authorities of cities and towns to furnish relief to a veteran who has a legal settlement in a city or town in this Commonwealth who is unable, through no fault of his own, to support himself; and in case he died leaving a dependent father or mother without proper means of support, they were entitled to such support as was necessary from the authorities of the city or town in which either of them had a legal settlement.

In my judgment, Gen. St. 1915, c. 163, was intended to make children who were in comfortable circumstances and negligent in the care of their destitute parents fulfil their duty towards them. It is clearly evident that this Commonwealth did not intend that its veteran soldiers or their dependents should be compelled to resort to its courts before becoming eligible to secure the aid which the Commonwealth is in duty bound to furnish. Accordingly, I am of the opinion that the soldier or widow has an independent status, or right to receive soldiers' relief, irrespective of the provisions of Gen. St. 1915, c. 163.

Very truly yours,
HENRY C. ATTWILL, *Attorney-General.*

Militia — Compensation — Termination of Service.

A furlough temporary in character or for a short period of time granted to one who has been mustered into the military service of the United States is not a termination of such service within the meaning of Gen. St. 1916, c. 310, § 1, but a furlough for an indefinite period would be.

Non-commissioned officers and men who were mustered into the military service of the United States, as described in the act abovementioned, who are ordered to remain in Massachusetts to instruct recruits for service on the Mexican border, or other work incidental to such instruction, are entitled to the benefits of this act.

OCT. 4, 1916.

Hon. CHARLES L. BURRILL, *Treasurer and Receiver-General.*

DEAR SIR: — You have asked my opinion as to certain questions which have arisen with reference to the proper construction of section 1 of chapter 310 of the General Acts of 1916. That section is as follows: —

There shall be allowed and paid out of the treasury of the commonwealth to each non-commissioned officer and soldier who has been, or who is hereafter, mustered into the military service of the United States as a part of the quota of this commonwealth for service on the Mexican Border, the sum of ten dollars per month. Said amount shall be payable monthly at the office of the treasurer and receiver general, and shall date from the muster-in to the United States service of said non-commissioned officer or soldier, and shall continue until January fifteen, nineteen hundred and seventeen, unless the service is sooner terminated. In case of the death of any enlisted man, his widow, minor children, parents or dependents shall receive the said monthly compensation for the period to January fifteen, nineteen hundred and seventeen.

Your first inquiry is whether the service specified in this section is to be regarded as terminated within the meaning of the statute when a furlough has been granted. This, in my opinion, depends upon the character of the furlough. If it is for a short period of time, and thus merely temporary in its character, and the soldier is still receiving pay from the United States, such a furlough is, in my opinion, to be regarded merely as a temporary excuse from duty and not as a termination of the service within the meaning of the statute. In that event, you should make payment under the statute without reference to the furlough. If, on the other hand, a furlough is granted for an indefinite period, and by it the soldier or non-commissioned officer is entirely relieved from his duties "as a part of the quota of this commonwealth for service on the Mexican Border" until he is again summoned for such duty, in my opinion in such a case the furlough is to be regarded as a termination of the service, and the payment provided for by the statute is to cease with the beginning of the furlough.

You also inquire whether non-commissioned officers and soldiers who were mustered into the military service of the United States as described in this act, but who were ordered to remain in Massachusetts to instruct recruits for service on the Mexican Border or for other work in Massachusetts incidental to such instruction, come within the provisions of the statute.

By its express terms the statute applies to all non-commissioned officers and soldiers mustered into the military service of the United States as a part of the quota of this Commonwealth for service on the Mexican Border. In my opinion this provision does not require that a non-commissioned officer or soldier shall actually be sent to the Mexican Border and perform his duty there. If such an officer or soldier was in fact mustered into the military service of the United States as a part of the quota of the Commonwealth, and still remains a part of that quota, performing duties incidental to the service of the quota on the Mexican Border, in my opinion he comes within the provisions of the statute, whether those duties are performed on the Mexican Border, in the Commonwealth of Massachusetts or anywhere else. In my opinion the non-commissioned officers and the soldiers to whom you refer are entitled to the payments specified in the statute.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Game — Open Season — Suspension of.

Under St. 1909, c. 422, § 1, the Governor is not authorized to issue a proclamation suspending the open season until such season begins.

Oct. 11, 1916.

His Excellency Samuel W. McCall, *Governor of the Commonwealth.*

Sir: — I beg to acknowledge your communication requesting my interpretation of the words "during an open season" as used in section 1 of chapter 422 of the Acts of 1909.

This section provides that "whenever, during an open season for the hunting of any kind of game in this state, it shall appear to the governor that by reason of extreme drouth the use of firearms in the forest is liable to cause forest fires, he may, by proclamation, suspend the open season."

It is my view that you are not authorized to issue such a proclamation until it shall appear to you, during an open season, that by reason of drouth the use of firearms in the forest is liable to cause forest fires. In other words, I do not think you are authorized to anticipate a condition which may not arise.

Accordingly, I am of the opinion that until the open season begins you are not authorized to issue your proclamation under the provisions of said section.

Very truly yours,

Henry C. Attwill, *Attorney-General.*

Weights and Measures — Prosecutions for Violations of Law — Procedure.

A prosecution may be instituted by the Commissioner of Weights and Measures for a violation of St. 1907, c. 394, without giving the parties concerned notice and an opportunity to be heard.

Oct. 21, 1916.

Thure Hanson, Esq., *Commissioner of Weights and Measures.*

Dear Sir: — I beg to acknowledge your request for my opinion as to whether a prosecution may be begun under the provisions of chapter 394 of the Acts of 1907 without giving the party concerned an opportunity to be heard by you under the provisions of section 8 of chapter 653 of the Acts of 1914.

Chapter 394 of the Acts of 1907, as amended by chapter 163 of the Acts of 1911, provides: "Whoever, himself or by his servant or agent or as the servant or agent of another person, gives or attempts to give false or insufficient weight or measure shall for a first offence be punished" as therein provided. This obviously applies to vendors of goods or merchandise sold by weight or measure. There is no limitation in this statute as to the manner in which prosecutions under it should be begun.

Chapter 653 of the Acts of 1914 makes it a criminal offence to "sell or offer for sale an article of food in package form, unless the net quantity of the contents be plainly and conspicuously marked on the outside of the package in terms of weight, measure or numerical count." Obviously this provision applies only to persons engaged in selling articles of food put up in package form. It cannot apply to articles sold from bulk by weight or measure. The offence is not giving false weight or measure, but selling a package which is not marked as required by statute. This last-mentioned statute contains the following provisions: —

Section 7. It shall be the duty of the commissioner of weights and measures to enforce the provisions of this act.

Section 8. Before prosecution is begun hereunder, the parties concerned shall be notified and given an opportunity to be heard before the commissioner of weights and measures.

In my opinion these statutes create and punish two separate and distinct offences. The last-mentioned statute in no way affects or modifies the statute of 1907. Accordingly, in my opinion sections 7 and 8 of the statute of 1914 have no application to violations of the statute of 1907, and I must advise you that prosecutions may be begun for violation of the statute of 1907 without first giving the party interested an opportunity to be heard before you in accordance with the provisions of section 8 of chapter 653 of the Acts of 1914.

Yours very truly,

Henry C. Attwill, *Attorney-General.*

Civil Service — Superintendents of Engineering and of Commerce.

Appointments to the positions of superintendent of engineering and superintendent of commerce, created by Gen. St. 1916, c. 288, are not subject to the rules and regulations of the Civil Service Commission.

Oct. 24, 1916.

Commission on Waterways and Public Lands.

Gentlemen: — You have requested my opinion as to whether any appointments that may be made to the positions of superintendent of engineering and superintendent of commerce, created under Gen. St. 1916, c. 288, are to be filled under the regulations of the Civil Service Commission.

At the time of the passage of said act the Civil Service Commission, under the provisions of R. L., c. 19, was authorized from time to time to prepare rules regulating the selection of persons to fill appointive positions in the government of the Commonwealth. Ordinarily, the passage of an act creating new appointive positions in the government of the Commonwealth would be subject to the provisions of chapter 19 of the Revised Laws, for the reason that it is not to be presumed that the Legislature intends to repeal or affect general laws passed by its predecessors unless there is something in the act, either by reason of its inconsistency with the general law or otherwise, which indicates an intention that the provisions of the general law are not to apply to the positions created.

It follows that if nothing had been said in chapter 288 of the General Acts of 1916 in relation to the civil service, the positions thereby created would be subject to the provisions of law relating to the civil service, unless there was some inconsistency in their application. Section 3 of said chapter 288 provides: —

> The commission shall appoint a superintendent of commerce and a superintendent of engineering who shall each receive such salary as the commission may determine, with the approval of the governor and council. They shall, under the control of the commission, perform such duties as may from time to time be assigned to them respectively by the commission. The commission may also employ such clerical and other assistance as may be necessary for the performance of its duties, subject to all general laws, now or hereafter in force, relating to appointments and employment in the civil service of the commonwealth.

It is to be noted that under said section the Legislature has provided specifically that all clerical and other assistance other than the superintendent of commerce and the superintendent of engineering shall be subject to all general laws now or hereafter in force relating to appointments and employment in the civil service of the Commonwealth. The Legislature, having thus specifically provided that the rules shall apply to all positions other than the superintendent of commerce and superintendent of engineering, indicated, it would seem, an intention that the positions of superintendent of commerce and superintendent of engineering should be excluded from the operation of the civil service law.

I am fortified in this opinion by the fact that section 9 of chapter 19 of the Revised Laws provides that —

> Judicial officers and officers elected by the people or by a city council, or whose appointment is subject to confirmation by the executive council, . . . shall not be affected as to their selection or appointment by any rules made as aforesaid.

While it is not entirely clear that the appointment of these officials is subject to the confirmation of the Governor and Council, yet the compensation to be paid them is unquestionably subject to such confirmation and approval, and the salary, apparently applying to the persons appointed rather than to the positions, necessarily, in a large measure, determines the appointment.

Accordingly, for the foregoing reasons, I am of the opinion that your question is to be answered in the negative.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Fire Prevention Commissioner — Automatic Sprinkler — Stables.

Under Gen. St. 1916, c. 158, § 2, providing that stables equipped with an automatic sprinkler system shall not be subject to certain other requirements, the word "stable" means the entire building, so that where the second floor of a building is used for stabling horses, this conditon is not fulfilled by equipping that floor alone with an automatic sprinkler system.

OCT. 25, 1916.

JOHN A. O'KEEFE, Esq., *Fire Prevention Commissioner.*

DEAR SIR: — With reference to chapter 158 of the General Acts of 1916 you have requested my opinion as to whether, in

a three-story building where horses are kept on the second floor, and only on the second floor, the word "equipped," in section 2, would be construed to relate to all floors, or only to the floor where the horses are stabled, or to the floor or place where the horses are stabled plus the dangerous part or parts of other floors.

The statute mentioned is entitled "An Act to require fire protection in stables for horses and mules." The first two sections are as follows: —

Section 1. No horse or mule shall be stabled on the second or any higher floor of any building unless there are two means of exit therefrom, at opposite ends of the building, to the main or street floor.

Section 2. This act shall not apply to stables equipped with an automatic sprinkler system.

Your question first raises the inquiry as to whether the word "stables," in section 2, includes the whole building in which the animals in question are stabled, or merely that floor or part of the building which is used for that purpose.

Our Supreme Court has used the following language in the case of *Riverbank Improvement Co.* v. *Bancroft*, 209 Mass. 217, at 221: —

In Worcester's Dictionary, edition of 1900, a stable is defined as "a house or building for horses or other beasts;" in Webster's edition of 1903, as "a house, shed, or building, for beasts to lodge and feed in; especially, a building or apartment with stalls, for horses; as, a horse stable; a cow stable;" and in the edition of 1910 in practically the same language; in the Century Dictionary, as "a building or an inclosure in which horses, cattle, and other domestic animals are lodged, and which is furnished with stalls, troughs, racks, and bins to contain their food and necessary equipments; in a restricted sense, such a building for horses and cows only; in a still narrower and now the most usual sense, such a building for horses only;" in the Standard Dictionary, edition of 1895, as a "building or part of a building set apart for lodging and feeding horses or cattle, especially one fitted with stalls, fastenings, etc., also often for storing hay or putting up vehicles: sometimes specifically carriage-stable, cow-stable, etc." In 36 Cyc. 812, and in 26 Am. & Eng. Encyc. of Law (2d ed.), 154, it is defined as "a house, shed, or building for beasts to lodge and feed in." See also *Dugle* v. *State*, 100 Ind. 259.

No other decision which has come to my attention throws any light upon this question, and it is to be observed that in

the case cited the point decided did not relate to a situation such as is here presented. The apparent purpose of the present statute seems to be to provide protection for the animals named, in the event of fire, by providing ready means of exit or providing means for extinguishing any fire which may start. Obviously, the lives of the animals are endangered as much, if not more, by fires which have started on the first or third floors of a three-story building as by fires which may start on the second floor, and the purpose of the act would not be accomplished if it were held to require merely the equipment with a sprinkler system on the second floor of such a building as you describe.

Taking these considerations into account I am of the opinion that in using the word "stables," in section 2, the Legislature intended to describe the entire building used for that purpose rather than any particular floor or portion of the same.

Accordingly, I am of the opinion that, in order to obtain the benefit of the exemption provided in section 2, it is necessary that all floors of a building such as is described in your request should be so equipped.

How extensive an installment of automatic sprinklers is necessary in order to comply with the provisions of this section is largely a question of fact. It probably is undesirable to attempt to lay down any hard and fast rule, such as saying that the "dangerous part or parts of other floors" are to be provided with sprinklers. The language of the statute is, "equip with an automatic sprinkler system." In my opinion, this requires a sprinkler system reasonably adequate for the premises in question, taking into account the character of the building and its parts with regard to the danger to be anticipated from fire.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Sentence — Permit to be at Liberty — Effect of.

Where a permit to be at liberty has been issued to a prisoner under R. L., c. 225, § 117, as amended by St. 1906, c. 244, if the permit is subsequently revoked, the prisoner is treated as not having served any portion of his sentence beyond the time he was held in prison, and therefore, if the revocation was made before the expiration of his original sentence, it is immaterial that the order of arrest issuing on such revocation is not served until after the expiration of such time.

Nov. 1, 1916.

Mr. Cyrus B. Adams, *Director, Bureau of Prisons.*

Dear Sir: — I beg to acknowledge receipt of your communication, requesting my opinion as to whether the fact that a warrant issued before the expiration of the sentence of a prisoner released from the Massachusetts Reformatory under a permit to be at liberty, and served after the time when the sentence would have expired if the prisoner had not been released under a permit to be at liberty, makes his return and commitment to the Massachusetts Reformatory improper.

R. L., c. 225, § 117, as amended by St. 1906, c. 244, provides as follows: —

> If it appears to the prison commissioners that a prisoner in the Massachusetts reformatory, or a prisoner who has been removed therefrom to a jail or house of correction, has reformed, they may issue to him a permit to be at liberty during the remainder of his term of sentence, upon such terms and conditions as they shall prescribe; but a prisoner who has been removed thereto from the state prison shall not be given a permit to be at liberty before the expiration of the minimum term of his sentence without the consent of the governor and council. They may delegate to a committee of their board or to their secretary, until their next meeting, the authority to decide when such permit shall be issued.

I assume that the prisoner was released under the provisions of this section.

R. L., c. 225, § 128, as amended by St. 1908, c. 251, provides for a revocation of such permit at any time previous to its expiration.

Section 129 of said chapter 225, as amended by St. 1903, c. 452, provides that upon such revocation the board having authority to revoke may issue an order authorizing the arrest of the holder of such permit and the return of such holder to the prison from which he was released; and further provides that—

> A prisoner who has been so returned to his place of confinement shall be detained therein according to the terms of his original sentence. In computing the period of his confinement the time between his release upon a permit, or on probation, and his return to prison, shall not be considered as any part of the term of his original sentence. If at the time of the order to return to prison or of the revocation of his permit he is confined in any prison, service of such order shall not be made until his release therefrom.

These statutes in effect provide that a prisoner who in the judgment of the Board of Parole has reformed may be released upon a permit to be at liberty, but that in the event circumstances arise justifying the Board in revoking the permit prior to the expiration of the permit, then the prisoner shall be treated as if he had not served any portion of his sentence beyond the time he was held in prison. In other words, his status is the same as if he had escaped from prison at the time he was so released. This seems to be clear from the last part of said section 129, which provides that if at the time of the order to return to the prison or of the revocation of the permit he is confined in any prison, service of such order shall not be made until his release therefrom. The status of the prisoner seems to be determined by the revocation. If the revocation takes place before the expiration of the time of his original sentence, then he may be rearrested and returned to prison.

Accordingly, I am of the opinion that it is immaterial whether the order of arrest issued upon the revocation was served before or after the expiration of the time of his original sentence.

Very truly yours,
HENRY C. ATTWILL, *Attorney-General.*

Vaccination — Certificates of Exemption from — Requisites of.

Under R. L., c. 44, § 6, as amended by St. 1907, c. 215, providing for exemption from vaccination of children attending public schools upon a certificate signed by a regular practicing physician that the child "is not a fit subject for vaccination," with the "cause stated therein," it is not necessary for the physician to further emphasize in his certificate that this is his opinion or that the cause stated is, in his opinion, sufficient to justify his statement; nor is it necessary that the physician signing such a certificate make a personal examination of the child.

Nov. 6, 1916.

Dr. EUGENE R. KELLEY, *Director, Division of Communicable Diseases.*

DEAR SIR: — You have submitted the following questions with reference to the validity of certain certificates for exemption from vaccination, namely: —

1. Must the physician make a personal examination?
2. Must the physician who signs the certificate be the one who makes this examination?

3. Must the certificate be so worded that it shows that it is the opinion of the examining and signing physician that the *cause* stated is sufficient?

4. Must not the certificate be so worded that it gives it as the *opinion of the physician who signs the certificate* that the child is not a fit subject for vaccination?

The Legislature has established at least three different regulations affecting children with reference to examinations by physicians on account of illness, or for the prevention of smallpox by vaccination.

St. 1906, c. 502, entitled "An Act relative to the appointment of school physicians," provides that a school physician shall make an examination of every child returning to school without a certificate from the board of health after absence on account of illness or from unknown cause, and in case such child shows symptoms of a contagious disease, he is to be prohibited from attending school by order of the school board. This statute, however, makes no reference to the subject of vaccination, nor does it give any authority to the school physician other than that of examination.

R. L., c. 44, § 6, as amended by St. 1907, c. 215, provides for certificates of exemption from vaccination of children attending public schools, and is as follows: —

A child who has not been vaccinated shall not be admitted to a public school except upon presentation of a certificate granted for cause stated therein, signed by a regular practising physician that he is not a fit subject for vaccination. A child who is a member of a household in which a person is ill with smallpox, diphtheria, scarlet fever, measles, or any other infectious or contagious disease, or of a household exposed to such contagion from another household as aforesaid, shall not attend any public school during such illness until the teacher of the school has been furnished with a certificate from the board of health of the city or town, or from the attending physician of such person, stating that danger of conveying such disease by such child has passed.

R. L., c. 75, §§ 136 to 139, inclusive, deal generally with the subject of vaccination. Section 139, as amended by St. 1902, c. 190, § 2, provides as follows: —

Any person over twenty-one years of age who presents a certificate signed by the register of a probate court that he is under guardianship shall not be subject to the provisions of section one hundred and

thirty-seven; and any child who presents a certificate, signed by a registered physician designated by the parent or guardian, that the physician has at the time of giving the certificate personally examined the child and that he is of the opinion that the physical condition of the child is such that his health will be endangered by vaccination shall not, while such condition continues, be subject to the provisions of section six of chapter forty-four of the Revised Laws or of the three preceding sections of this chapter; and the parent or guardian of such child shall not be liable to the penalties imposed by section one hundred and thirty-six of this chapter.

It will be seen, therefore, that chapter 44 of the Revised Laws refers alone to vaccination for the purpose of attending school, and the sections of chapter 75 of the Revised Laws apply to both children and adults, irrespective of school attendance. It will also be observed that said section 137 of chapter 75 gives the boards of health in cities and towns the right to enforce vaccination of all inhabitants, except as provided in section 139.

In answer to the questions submitted by you, assuming they relate to school attendance, it is evident that only R. L., c. 44, applies. If a child desiring admission to a public school presents a certificate, signed by a regular practicing physician, that "he is not a fit subject for vaccination," with the "cause stated therein," the statute is complied with. Under this chapter a personal examination by a physician is not necessary, and hence your second question does not require an answer.

Your third question is to be answered in the negative, and your fourth question in the affirmative. The statute expressly provides that the exemption certificate shall state that the child "is not a fit subject for vaccination." That necessarily is a matter of opinion, and, as such, is the opinion of the physician signing the certificate. It would not seem necessary to require such physician to further emphasize his opinion by asserting that it is also his opinion that the cause stated is sufficient to justify his statement. The cause stated, in my judgment, must be an adequate and lawful one in order to give the certificate validity. A cause absurd on its face, showing a deliberate intent to evade the statute, would not be, in my opinion, a compliance with it.

R. L., c. 75, § 139, which is enforceable only by boards of health of cities and towns, compels a personal examination by a physician, and a statement that in his opinion the physical

condition of a person is such that his health would be endangered by vaccination, in order to avoid the requirements of the chapter. Under this section no cause need be assigned by the physician for his statement.

It is to be noted that the provision for a certificate under the provisions of section 6 of chapter 44 of the Revised Laws, as amended by St. 1907, c. 215, is not to be construed as taking away from the school committee the power to make proper regulations for the protection of all the pupils, if the prevalence of smallpox seems to require special precautions. When such a prevalence exists, under proper regulations the school committee can exclude all pupils who have not been vaccinated. *Hammond* v. *Hyde Park*, 195 Mass. 29.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Industrial School for Girls — Revocation of Suspended Sentence — Age of Person committed — Whether Trustees can inquire into.

Where a girl has been sentenced to confinement in the Industrial School for Girls while she was under the age of seventeen years, and the sentence then suspended, the suspension may be revoked and the girl committed to this institution, under St. 1913, c. 471, § 2, even after she has attained that age.

Where the order of commitment to this institution recites the age of the girl committed, the recital amounts to an adjudication by the court upon this question, and it is not the duty of the trustees of the institution to inquire into the correctness of this finding.

Nov. 7, 1916.

Trustees of the Massachusetts Training Schools.

GENTLEMEN: — You have requested my opinion upon the following questions: —

1. Have the trustees in charge of the Industrial School for Girls a right to retain custody of a person committed to the said institution who has in fact passed her seventeenth birthday at the time of commitment?

2. If, after commitment, it becomes a question of fact whether the person was not over seventeen years of age at the time of commitment, but the mittimus transmitted by the court of commitment recites the age as under seventeen years, what are the duties of the trustees in charge of the Industrial School for Girls under such circumstances, as regards the custody of the person committed?

3. Is the right of the trustees in charge of the Industrial School for Girls to retain custody of a girl who had passed her seventeenth birthday when she was committed to the said school affected by the fact that she had been sentenced to this institution prior to her seventeenth birthday, but the sentence had been suspended, and commitment then made after the seventeenth birthday by revocation of the suspension of sentence?

Taking up these questions in inverse order, the statute pertaining to the third question seems to be the following: —

Boys under fifteen years of age may be committed to the Lyman school by police, district and municipal courts and trial justices, and, except in the county of Suffolk, by judges of probate. Girls under seventeen years of age may be committed to the industrial school by said courts, judges and justices, except as aforesaid, and, except in the county of Suffolk, by commissioners, as hereinafter provided in this chapter. (R. L., c. 86, § 10.)

The provisions of law with reference to suspended sentences are: —

When a person convicted before a municipal, police or district court is sentenced to imprisonment, the court may direct that the execution of the sentence be suspended, and that he be placed on probation for such time and on such terms and conditions as it shall fix. (R. L., c. 220, § 1, as amended by St. 1913, c. 653.)

At any time before the final disposition of the case of a person who has been placed on probation in the custody of a probation officer, the probation officer may arrest him without a warrant and take him before the court, or the court may issue a warrant for his arrest. When he is taken before the court, it may, if he has not been sentenced, sentence him or make any other lawful disposition of the case, and if he has been sentenced, it may continue or revoke the suspension of the execution of his sentence. If such suspension is revoked, the sentence shall be in full force and effect. (R. L., c. 220, § 2.)

In all cases the execution of orders of commitment to the Massachusetts reformatory, the reformatory for women, the Suffolk school for boys, the Plummer farm school of reform for boys, any truant school, however named, any house of reformation for juvenile offenders, the Lyman school, the industrial school for girls, the industrial school for boys, and the state board of charity, may be suspended, and such suspension continued or revoked, in the same manner and with the same effect as the execution of sentences in criminal cases. (St. 1913, c. 471, § 2.)

Accordingly, it seems that your question is directly answered by the enactment last quoted. The sentence in such case is imposed at a time when the defendant is less than seventeen years of age, and accordingly authorized by the statute. The provisions quoted above are to the effect that if suspension is revoked "the sentence shall be in full force and effect," and under St. 1913, c. 471, these provisions are made applicable to sentences to the Industrial School for Girls.

Accordingly, in my opinion your third question is to be answered in the negative.

The two remaining questions raise the issue as to the duty of your Board to investigate and act upon claims presented that particular inmates have been improperly sentenced. R. L., c. 86, § 22, provides for the form of the warrant of commitment which is to be issued in the cases of girls sent to the Industrial School. This form contains the statement: —

> You are hereby commanded to take charge of C. D., a boy (or girl) between the ages of seven and fifteen (or seventeen, if a girl) years.

I assume that warrants issued by the various courts of the Commonwealth in these cases comply with this requirement of the statute, and that being so, it would seem to furnish a complete warrant for your holding the particular person transmitted under it. It implies an adjudication upon the part of the court that that particular person, at the time of commitment, is less than seventeen years of age, and it can hardly be your duty to inquire into the correctness of such finding.

I am of opinion that such warrant is a complete authorization to you for holding such defendant.

In general, the officers of the Commonwealth to whom is intrusted the execution of the orders of the criminal courts cannot be required or supposed to question the correctness of those orders, and in general the orders furnish entire protection to such officials for acts done in executing them.

The cases of *Jones* v. *Robbins*, 8 Gray, 329, 330, and *Martin* v. *Collins*, 165 Mass. 256, which have been previously brought to your attention, are authority for these propositions. It is true that there may be some doubt as to the state of the law in protecting an officer serving a civil process of arrest beyond the jurisdiction of the court issuing it, but such cases do not seem to question the right of an officer to execute a criminal process valid upon its face.

Your questions, however, do not throw doubt upon the jurisdiction of the court, but only raise a question of doubt as to the validity of the sentence imposed, because of the age of the defendant.

Even in a civil case it has been held that an officer was protected in the execution of a warrant, although as a matter of fact the defendant was of such an age as to be exempt from arrest. *Cassier* v. *Fales*, 139 Mass. 461.

Accordingly, I am of the opinion that it is not your duty to attempt to try the question of fact as to whether a particular person has been properly sentenced or not. Such person can raise the question and have her rights adjudicated by proper proceedings in court.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Electrician — Master's Certificate — Who must take Examination.

A "master electrician's certificate" cannot be granted to a person, firm or corporation upon the examination of one who is merely an employee of such person, firm or corporation. But if the applicant for such a certificate is a person, the examination must be taken by him personally; if a firm, by a member of the firm; or if a corporation, by an officer of the corporation.

Nov. 10, 1916.

State Examiners of Electricians.

GENTLEMEN: — You have requested my opinion as to whether a master's certificate to do business under the provisions of Gen. St. 1915, c. 296, § 3, can be granted to a person, firm or corporation engaged in, or about to engage in, the business of installing electrical wires, conduits, apparatus, fixtures and other electrical appliances, assuming that the person so applying, or a member of the firm, or an officer of the corporation so applying, does not submit to take the examination required, but such examination is taken by a person who is an employee of the person, firm or corporation applying for the license.

The provisions of the act mentioned are far from clear upon this point. The act provides that your Board shall hold frequent examinations in the city of Boston, and twice each year in five other convenient places within the Commonwealth. Section 2 also provides that "said examinations shall be suffi-

ciently frequent to give ample opportunity for all applicants to be thoroughly and carefully examined. . . ."

Section 3 provides, in part: —

(1) Two forms of licenses shall be issued: — The first, hereinafter referred to as "certificate A", shall be known as "master electrician's certificate." . . .

A "master's certificate" shall be issued to any person, firm or corporation engaged in or about to engage in the business of installing electrical wires, conduits, apparatus, fixtures and other electrical appliances, that shall have qualified under the provisions of this act. A certificate of registration shall be issued specifying the name of the person, firm or corporation so applying, and the name of the person passing said examination, by which he or it shall be authorized to enter upon or engage in business as set forth therein: . . .

. . . . . .

(3) All certificates "A" described in paragraph (1) of this section shall expire on the thirty-first day of July in each year, but may be renewed by the same person, firm or corporation, as represented by one or more of its members or officers, without further examination. . . .

The provision that the certificate of registration "shall be issued specifying the name of the person, firm or corporation so applying, *and the name of the person passing said examination,*" on its face might seem to indicate that the examination might be taken by some other person than the applicant. However, it is to be observed that in case the applicant is a corporation the examination must be taken by some individual, and in the case of a partnership might be taken by one member of the firm, so that a reason for the Legislature inserting this requirement is apparent, even if in the case of individuals it was intended that the applicant for the certificate should be obliged to take the examination in person.

There is no definite categorical provision for the manner of examination in the case of a partnership or corporation.

In the case of an individual it would seem to be a most unpractical arrangement if an examination which would satisfy the provisions of the law might be taken by an employee. As a practical matter the requirement of the examination might be rendered entirely nugatory, as a person could be employed for a day or two, while the examination was being taken, and then his services dispensed with after the certificate had been obtained.

The provision of section 2, that "said examinations shall be sufficiently frequent to give ample opportunity for all applicants to be thoroughly and carefully examined," shows a slight indication that it is the applicants for licenses that are to take the examinations. The further provision of section 3, paragraph (3), for renewal by "the same person, firm or corporation *as represented by one or more of its members or officers,*" further indicates the intention of the Legislature as to the manner of issuance of certificates to firms and corporations.

I see no reason for thinking that the Legislature intended that the firm or corporation should be represented by different classes of persons in the application for renewal from those authorized to do so upon the original application for license, and from this section quoted it would appear that in such application and examination a firm is to be represented by one or more of its members, and a corporation by one or more of its officers.

Accordingly, although the matter is not entirely clear, I am of the opinion that a master's certificate, under the provisions of Gen. St. 1915, c. 296, is not to be granted when the person applying, or a member of the firm or officer of the corporation so applying, has not passed the examination prescribed, and that taking and passing such an examination by a person who is merely an employee of the applicant does not satisfy the terms of the statute.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Hawker and Pedler — Whether a Person licensed as a Junk Collector who collects Junk solely by Barter is — "Sale."

A barter or exchange of goods, wares or merchandise is not strictly a sale, and consequently a person who is licensed as a junk collector under St. 1902, c. 187, who collects junk solely by barter of articles of merchandise not mentioned in R. L., c. 65, § 15, is not required to be licensed under the hawkers and pedlers statute.

Nov. 15, 1916.

THURE HANSON, Esq., *Commissioner of Weights and Measures.*

DEAR SIR: — I beg to acknowledge your request for my opinion as to whether a person licensed as a junk collector, and authorized "to collect, by purchase or otherwise, junk, old metals and secondhand articles from place to place" in a city

or town under the provisions of chapter 187 of the Acts of 1902, is required to be licensed as a hawker or pedler in case he exchanges for such junk goods, wares or merchandise not mentioned in section 15 of chapter 65 of the Revised Laws, as amended.

At the time of the enactment of chapter 187 of the Acts of 1902 a hawker or pedler was defined by Revised Laws, chapter 65, section 13, as a person who "goes from town to town or from place to place in the same town carrying for sale or exposing for sale goods, wares or merchandise." By section 14 of this chapter, as then in force, "the sale by hawkers or pedlers" of certain articles was prohibited. By section 15 "hawkers and pedlers may sell without a license" certain specified articles. Section 16 was as follows: —

> Articles other than those mentioned in the preceding section and not prohibited by section fourteen, including those of the growth or production of foreign countries, shall not be sold by hawkers or pedlers unless duly licensed as hereinafter provided.

Section 19 established a method for the licensing of hawkers and pedlers, and authorized such licensees within the territory specified in the license to "sell any goods, wares or merchandise, not prohibited in section fourteen."

It is to be noted that a barter or exchange of goods, wares or merchandise is in no way referred to in any of these sections.

The word "sale," both in common usage and in legal phraseology, is ordinarily used to indicate the disposition of property for a price payable in money in distinction from barter or exchange, where the consideration for the disposition of the goods is other goods received in return. See Century Dictionary, definition of "sale." In view of this ordinary meaning of the word "sale," and bearing in mind that the hawkers and pedlers statute is essentially penal and must be construed strictly, I am of the opinion that in the form in which it appears in the Revised Laws this statute did not apply to or in any way prohibit the barter or exchange of goods, wares and merchandise for other articles. This seems to be the construction which the Legislature itself has placed upon this section, for, by chapter 242 of the General Acts of 1916, the words "or barter" and "bartering" were added by amendment to section 13 of chapter 65 of the Revised Laws, and also section 19 of that chapter.

Accordingly, it follows that at the time of the enactment of chapter 187 of the Acts of 1902 a person who collected junk solely by barter was not a hawker or pedler nor subject to the statutes regulating hawkers and pedlers. It is plain, therefore, that until the enactment of chapter 242 of the General Acts of 1916 a duly licensed junk collector was not required to have a hawker's and pedler's license in order to collect junk by bartering for it goods not mentioned in section 15 of chapter 65 of the Revised Laws.

The amendments made by chapter 242 of the General Acts of 1916, so far as material to the question under discussion, related only to the definition of a hawker or pedler, as set forth in section 13 of chapter 65 of the Revised Laws, and to the form of the license, as set forth in section 19. Section 14, prohibiting merely the sale of certain articles, section 15, authorizing merely the sale without a license of certain articles, and section 16, prohibiting the sale by hawkers and pedlers of all other articles unless duly licensed, were left unchanged.

It appears to be this last-mentioned section only which makes it possible to prosecute criminally unlicensed hawkers and pedlers. In view of the fact that section 16 prohibits only sales by unlicensed hawkers and pedlers, and in no way refers to barter, it is a grave question whether any person may not go from town to town or from place to place in the same town carrying merely for barter or exposing for barter goods, wares or merchandise, whether they are mentioned in section 15 or not.

In view of its penal nature it seems probable that the courts will construe section 16 strictly as applying only to sales by hawkers and pedlers and as not prohibiting bartering. However that may be, in my opinion it was not the intention of the Legislature, by the amendments made by chapter 242 of the General Acts of 1916, to bring within the scope of the hawkers and pedlers statute activities which were already fully regulated with ample license requirements by chapter 187 of the Acts of 1902. Such reduplication of regulation and license requirements would impose an undue and apparently unnecessary burden upon junk collectors, and the statute ought not to be construed to bring about such a result unless its terms plainly so require.

Accordingly, I advise you that a person licensed as a junk collector, under the provisions of chapter 187 of the Acts of 1902, who collects junk by barter of articles of merchandise

not mentioned in section 15 of chapter 65 of the Revised Laws, and who makes no sales of such articles, is not required to be licensed under the hawkers and pedlers statute.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Forest Land — Limit of Price to be paid — Incidental Expenses.

Whether it would be advisable for the State Forest Commission to take a parcel of land by eminent domain rather than by purchase is not a question of law but one of policy for the commission itself to decide.

The restriction placed by St. 1914, c. 720, § 2, upon the price which may be paid per acre for land acquired under that act, refers only to the purchase price, and does not include incidental expenses such as for surveying and examining the title.

Nov. 17, 1916.

Mr. CHARLES O. BAILEY, *Secretary, State Forest Commission.*

DEAR SIR: — I acknowledge your letter of the 14th inst., in which you request my opinion in relation to two questions, one as to the advisability of purchasing the interests of certain owners in tracts of land owned in common by these owners and the Commonwealth, rather than to take the interests of the owners by eminent domain; and the other as to whether the average cost of land purchased by the commission, restricted to $5 an acre under the provisions of section 2 of chapter 720 of the Acts of 1914, includes the necessary expenses of engineering, conveyancing and investigation of title and other incidental charges necessary to the purchase.

You state in relation to your first inquiry that the parcels of land involved are included in a large tract of land acquired in the name of the Commonwealth in the towns of Carver and Plymouth, and that the owners have asked a sum per acre in excess of other land purchased by the commission in this tract.

The question is necessarily one for your commission itself to determine, as there is no question of law involved.

My own view is that if the price at which you can secure the interest is not unreasonably large, and the excess over the fair value to be paid would be less than the cost of the trial of the cases, in this particular instance you would be justified in paying the amount demanded by the owners.

As to your second question, your commission, under the provisions of St. 1914, c. 720, § 2, has the power to acquire by purchase or otherwise land suitable for timber cultivation. The

statute provides that the average cost of the land purchased by the commission shall not exceed $5 an acre. This permits a higher price for some parcels and a lower price in other instances, provided the average cost does not exceed the amount specified. The language of the statute would indicate that this clause has reference only to the purchase price, and does not include incidental expenses, such as surveying, examination of title and other necessary charges.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Boards of Health, Local — Oleomargarine — Authority to limit Number of Licenses for Sale of.

Under R. L., c. 56, § 70, authorizing boards of health of cities and towns to make reasonable rules and regulations as to the conditions under which all articles of food may be kept for sale, they may not limit the number of places where oleomargarine may be sold.

Nov. 17, 1916.

Mr. WILFRED WHEELER, *Secretary, State Board of Agriculture.*

DEAR SIR: — You desire to be informed as to whether there is any statute which authorizes local boards of health to make regulations limiting the number of licenses for the sale of oleomargarine in any particular town. In my opinion there is no such authority granted to the local boards of health.

R. L., c. 56, § 40, requires that every person, before selling or offering for sale oleomargarine, shall register his name and proposed place of sale with the inspector of milk, or with the town clerk if there is no inspector of milk, and provides a penalty for neglecting to so register. By this statute the duties of the inspector of milk or of the town clerk are merely clerical. R. L., c. 56, § 70, as amended, authorizes boards of health of cities and towns to make and enforce reasonable rules and regulations, subject to the approval of the State Department of Health, as to the conditions under which all articles of food may be kept for sale, in order to prevent contamination thereof and injury to the public health. In my opinion, however, these provisions do not authorize boards of health to limit the number of places where such food may be sold.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Tenure of Office — Whether Appointment to fill Vacancy is for Unexpired Portion of Term of Predecessor or for a Full New Term.

Where a clerk of a district court resigned before the expiration of his term of office, and an appointment was made thereto by the Governor under R. L., c. 160, § 9, the appointee holds for a term of five years from the date of his appointment.

Dec. 5, 1916.

His Excellency Samuel W. McCall, *Governor of the Commonwealth.*

Sir: — I acknowledge your request for my opinion as to whether an appointment on July 26, 1916, to the office of clerk of the central district court of northern Essex was for a term of five years from July 26, 1916, or for the balance of the time his predecessor would have continued in office but for his resignation.

Section 9 of chapter 160 of the Revised Laws is as follows:—

Clerks of police, district and municipal courts shall, except as provided in the three following sections, be appointed by the governor, with the advice and consent of the council, for the term of five years.

The provisions for the appointment of clerks in the three following sections relate to the appointment of a clerk by a justice of a police or district court for which no clerk is required by law, and the appointment of assistant clerks by the clerks of police, district or municipal courts, and the appointment of temporary clerks by the court. There appears to be no provision for the appointment of clerks of police, district or municipal courts by the Governor except for the term of five years. I find that it has been the invariable practice of the office of the Secretary of the Commonwealth to issue the commissions in all cases for five years.

In view of the language of the statute and the practice that has heretofore obtained, I am of the opinion that the appointment referred to was for a term of five years from July 26, 1916.

Very truly yours,

Henry C. Attwill, *Attorney-General.*

Great Ponds — Right of Access to — Liability for Trespass.

In general, the public has a right to pass and repass, for the purpose of hunting or fishing, and possibly other purposes, over uncultivated and unenclosed land belonging to private proprietors and bordering on a great pond, provided there is no other reasonable means of access thereto, without being liable for trespass. But no right of access exists, for the purpose of fishing, to great ponds of twenty acres or less where such pond is entirely surrounded by land of private proprietors. There is no right of access, in any event, over cultivated land where access may be obtained over uncultivated and unenclosed land.

Dec. 11, 1916.

Commissioners on Fisheries and Game.

Gentlemen: — I acknowledge your letter in which you ask my opinion on the following question: —

In case all the land around a great pond of the Commonwealth is bought up, and is posted against trespass by the landowners, is there any provision of law whereby a right of way to this pond can be established for the benefit of the public?

The earliest reference to great ponds is found in the Body of Liberties, adopted in 1641 by the Massachusetts Bay Colony, and is as follows: —

Every inhabitant that is an howse holder shall have free fishing and fowling in any great ponds . . . within the presincts of the towne where they dwell, unlesse the free men of the same towne or the Generall Court have otherwise appropriated them, provided that this shall not be extended to give leave to any man to come upon others proprietie without there leave. Body of Liberties, § 16.

This, it will be observed, gave no right to cross the land of others except by their leave.

The amendments which concerned the sixteenth section, as they appear in the edition of the colony laws of 1660 and in the Ancient Charters, 148, were quite material and were adopted in 1649. Great ponds are defined to be those containing more than ten acres of land, and it is provided that no town shall appropriate any great pond to any particular person or persons. Section 4 is as follows: —

And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow.

The effect of the provision which has been referred to in the Body of Liberties and its amendments was to reserve the great ponds for the public use. *West Roxbury* v. *Stoddard*, 7 Allen, 158; *Commonwealth* v. *Roxbury*, 9 Gray, 451.

It is apparent that the Legislature has not deemed it necessary to change the definition of great ponds in this Commonwealth, since they were defined in the Body of Liberties, as amended in 1649, as ponds containing more than ten acres of land. This is evident from R. L., c. 96, § 27, which provides: —

> The provisions of this chapter relative to great ponds shall apply only to ponds which contain in their natural state more than ten acres of land, and shall be subject to any rights in such ponds which have been granted by the commonwealth.

This right of persons to have access to great ponds is further emphasized by the provisions of chapter 91 of the Revised Laws, which provides in section 15 that —

> The fishery of a pond, the area of which is more than twenty acres, shall be public, except as hereinafter provided; and all persons shall, for the purpose of fishing, be allowed reasonable means of access thereto.

R. L., c. 91, §§ 23, 24 and 25, provide as follows: —

> Section 23. The riparian proprietors of any pond, the area of which is not more than twenty acres, and the proprietors of any pond or parts of a pond created by artificial flowing shall have exclusive control of the fisheries therein.

> Section 24. A pond which is not more than twenty acres in area and is bounded in part by land belonging to a town or county shall become the exclusive property of the individual proprietors as to the fisheries therein only upon payment to the town treasurer, county commissioners or treasurer and receiver general of a just compensation for their respective rights therein, to be determined by three persons, one of whom shall be a riparian proprietor of said pond, one the chairman of the board of selectmen, if the rights of a town are in question, or of the county commissioners, if the rights of a county or of the commonwealth are in question, and one to be appointed by the commissioners on fisheries and game.

> Section 25. Whoever, without the written consent of the proprietor or lessee of a natural pond, the area of which is not more than twenty acres, or of an artificial pond of any size, in which fish are lawfully cultivated or maintained, takes any fish therefrom, shall forfeit not more than twenty-five dollars for each offence.

The effect of the foregoing sections is to cut off the right of the public to fish in great ponds twenty acres or less in area, where the pond is entirely surrounded by land of private riparian proprietors, and also in such ponds where the pond is entirely surrounded by private riparian owners and land belonging to towns or counties, when compensation has been paid in accordance with the provisions of section 24. These provisions in no way affect the rights of the public in relation to ponds in excess of twenty acres in area.

Thus it is evident that, in the absence of some common land or public way, the public would in many cases be deprived of the benefit of the public reservation unless persons were enabled to gain access to the pond over land of private individuals without being deemed guilty of trespass.

In *Slater* v. *Gunn*, 170 Mass. 509, at p. 514, the court seems to construe that part of the colonial ordinance of 1649, providing that any man should be free to "pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow," as limiting the right to passing and repassing to unimproved and unenclosed lands lying on the ponds.

It is to be obeserved, however, that the Legislature, by the provisions of sections 14 and 15 of chapter 91 of the Revised Laws, has provided that the Commissioners on Fisheries and Game, in the discharge of their duties, may enter upon and pass through or over private property, and that all persons shall be allowed reasonable means of access to great ponds of more than twenty acres for the purpose of fishing, without rendering themselves liable as trespassers.

Accordingly, I am of the opinion that no permanent right of way can be established to a great pond for the benefit of the public except by prescription or action on the part of public authorities. However, in my judgment fishermen, hunters and possibly others may pass over uncultivated and unenclosed land bordering on a great pond, which is posted against trespass, provided there is no other reasonable means of access thereto, without being deemed guilty of trespass.

It is to be noted that where the ponds are of less than twenty acres in area and are entirely surrounded by land of private proprietors bordering thereon, the right to pass and repass over land of these proprietors for the purpose of fishing does not exist, for the reason that the right to fish in the ponds is exclusively in the proprietors.

I am also of the opinion that, under the provisions of sections 14 and 15 of chapter 91 of the Revised Laws, where there is no other reasonable means of access to great ponds of more than twenty acres, persons may in a reasonable manner pass over the land of proprietors bordering on such ponds, for the purpose of gaining access thereto for fishing, without rendering themselves liable as trespassers. It is my view that under the provisions of these sections passing over cultivated land is not reasonable when access can be obtained over uncultivated or unenclosed land.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Convention — Candidates for Delegates to — Arrangement of Names of on Ballot.

The names of candidates for the office of delegate to the Constitutional Convention to be held under Gen. St. 1916, c. 98, § 9, should be arranged upon the ballot to be used at the election of such delegates, and at any primaries for the nomination of candidates to this office, alphabetically according to their surnames, and not in groups in the manner provided by St. 1913, c. 835, § 107, for the election of delegates to conventions at the primaries.

DEC. 29, 1916.

Hon. ALBERT P. LANGTRY, *Secretary of the Commonwealth.*

DEAR SIR: — Your letter requests my opinion upon the question of whether the names of candidates for the office of delegate to the Constitutional Convention, to be held under the provisions of Gen. St. 1916, c. 98, should be arranged upon the ballot to be used at the election of such delegates, or at any primary which may be held under said act for the nomination of candidates for this office, alphabetically according to their surnames, in accordance with the provisions of St. 1913, c. 835, § 259, or whether such names should be arranged in groups in such order as may be determined by lot, in the manner provided by section 107 of said chapter 835 for the election of delegates to conventions at the primaries.

Gen. St. 1916, c. 98, § 9, provides that —

All laws relating to nominations and nomination papers, and to primaries, elections and corrupt practices therein, shall, so far as is consistent herewith, apply to the nomination of candidates for delegate to the convention, and to the primaries and special election provided for by this act.

St. 1913, c. 835, § 259, is as follows: —

The names of candidates for every state, city and town office, except the names of candidates for presidential electors, shall be arranged under the designation of the office in alphabetical order according to the surnames. . . .

Section 107 of said act, relating to the arrangement of names on the ballots to be used at the primaries, provides that —

Names of candidates for each elective office shall be arranged alphabetically according to their surnames.

Names of candidates for ward or town committees, and for delegates to conventions shall be arranged in groups in such order as may be determined by lot, under the direction of the secretary of the commonwealth. . . .

It is plain that the provision contained in the paragraph last quoted for the arrangement of the names of delegates to conventions in groups does not apply to primaries held for the nomination of delegates to the Constitutional Convention, for the reason that the primaries held under the general law are for the purpose of electing delegates to conventions, while under said chapter 98 of the General Acts of 1916 the primary is not for the purpose of electing the delegates but only for nominating them.

Furthermore, a grouping of the names of candidates for delegate to the Constitutional Convention would seem neither to be contemplated by the act nor to be consistent therewith, for section 5 of that act provides that no party or political designation shall appear on said ballot.

Accordingly, I beg to advise that I am of the opinion that the names of delegates for the Constitutional Convention should be arranged alphabetically according to their surnames, both on the ballot to be used at the election and at such primaries, if any, as may be held for the nomination of such delegates.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

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GRADE CROSSINGS.

Notices have been served upon this department of the filing of the following petitions for the appointment of special commissioners for the abolition of grade crossings: —

Berkshire County.

Lanesborough, Selectmen of, petitioners. Petition for abolition of Valley Road and Glen Road crossings. Railroad Commissioners appointed commissioners. Commissioners' report filed. Frank H. Cande appointed auditor. Auditor's third report filed. Disposed of.

North Adams, Mayor and Aldermen of, petitioners. Petition for abolition of State Street and Furnace Street crossings. Edmund K. Turner, David F. Slade and William G. McKechnie appointed commissioners. Commissioners' report filed. Pending.

Pittsfield, Mayor and Aldermen of, petitioners. Petition for abolition of Merrill crossing in Pittsfield. Thomas W. Kennefick, Frederick L. Green and Edmund K. Turner appointed commissioners. Pending.

Stockbridge, Selectmen of, petitioners. Petition for abolition of South Street crossing. Railroad Commissioners appointed commissioners. Commissioners' report filed. A. W. DeGoosh appointed auditor. Auditor's first report filed. Disposed of.

Stockbridge. Berkshire Railroad, petitioner. Petition for abolition of Glendale station crossing. Pending.

West Stockbridge, Selectmen of, petitioners. Petition for abolition of grade crossing at Albany Street. James D. Colt, Charles W. Bosworth and James L. Tighe appointed commissioners. Pending.

Bristol County.

Mansfield. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of grade crossing at North Main, Chauncey, Central, West, School and Elm streets in Mansfield. Samuel L. Powers, Stephen S. Taft and Wm. Jackson appointed commissioners. George F. Swain appointed commissioner in place of Wm. Jackson, deceased. Agreement to dismiss filed. Pending.

Somerset. New York, New Haven & Hartford Railroad Company, petitioner. Petition for abolition of grade crossing at Wilbur Avenue. James D. Colt, Henry H. Baker and Louis Perry appointed commissioners. Commissioners' report filed. Edward A. Thurston appointed auditor. Auditor's first report filed. Disposed of.

Swansea. New York, New Haven & Hartford Railroad Company, petitioner. Petition for abolition of grade crossing at River Road. James D. Colt, Henry H. Baker and Louis Perry appointed commissioners. Commissioners' report filed. Edward A. Thurston appointed auditor. Auditor's first report filed. Disposed of.

Taunton, Mayor and Aldermen of, petitioners. Petition for abolition of grade crossings at Danforth and other streets in Taunton. Thomas M. Babson, George F. Swain and Edwin U. Curtis appointed commissioners. Charles H. Beckwith appointed commissioner in place of Thomas M. Babson, deceased. Commissioners' report filed. James A. Stiles appointed auditor. Pending.

Essex County.

Gloucester. Boston & Maine Railroad, petitioner. Petition for abolition of crossings at Magnolia Avenue and Brays crossing. Arthur Lord, Moody Kimball and P. H. Cooney appointed commissioners. Commissioners' report filed. A. W. DeGoosh appointed auditor. Auditor's third report filed. Pending.

Gloucester. Directors of Boston & Maine Railroad, petitioners. Petition for abolition of grade crossing between Washington Street and tracks of Boston & Maine Railroad. Pending.

Haverhill, Mayor and Aldermen of, petitioners. Petition for abolition of Washington Street and other crossings in Haverhill. George W. Wiggin, William B. French and Edmund K. Turner appointed commissioners. Commissioners' report filed. Fred E. Jones appointed auditor. E. A. McLaughlin appointed auditor in place of Fred E. Jones, deceased. Auditor's seventeenth report filed. Pending.

Ipswich, Selectmen of, petitioners. Petition for abolition of High Street and Locust Street crossings. Geo. W. Wiggin, Edmund K. Turner and William F. Dana appointed commissioners. Commissioners' report filed. Fred E. Jones appointed auditor. E. A. McLaughlin appointed auditor in place of Fred E. Jones, deceased. Auditor's fourth report filed. Disposed of.

Lawrence, Mayor and Aldermen of, petitioners. Petition for abolition of crossing at Merrimac and other streets in Lawrence. Robert O. Harris, Edmund K. Turner and Henry V. Cunningham appointed commissioners. Pending.

Lynn, Mayor and Aldermen of, petitioners. Petition for abolition of Summer Street and other crossings on Saugus branch of Boston & Maine Railroad and Market Street and other crossings on main line. George W. Wiggin, Edgar R. Champlin and Edmund K. Turner appointed commissioners. Commissioners' report filed. Edward A. McLaughlin appointed auditor. Auditor's seventh report filed. Pending.

Lynn, Mayor and Aldermen of, petitioners. Petition for abolition of grade crossings at Pleasant and Shepard streets, Gas Wharf Road and Commercial Street, on the Boston, Revere Beach & Lynn Railroad. Pending.

Salem. Directors of Boston & Maine Railroad, petitioners. Petition for the abolition of grade crossings at Bridge, Washington, Mill, North, Flint and Grove streets in Salem. Patrick H. Cooney, George F. Swain and William A. Dana appointed commissioners. Pending.

Salem, Mayor and Aldermen of, petitioners. Petition for abolition of Lafayette Street crossing in Salem. Pending.

Franklin County.

Deerfield, Selectmen of, petitioners. Petition for abolition of "Upper Wisdom Road" crossing. Edmund K. Turner, Calvin Coolidge and Hugh P. Drysdale appointed commissioners. Commissioners' report filed. Lyman W. Griswold appointed auditor. Auditor's first report filed. Disposed of.

Erving, Selectmen of, petitioners. Petition for abolition of grade crossing on the road leading from Millers Falls to Northfield. Samuel D. Conant, Arthur H. Beers and Charles C. Dyer appointed commissioners. Commissioners' report filed. Pending.

Greenfield, Selectmen of, petitioners. Petition for abolition of grade crossing at Silver Street. Stephen S. Taft, Henry P. Field and Thomas J. O'Connor appointed commissioners. Commissioners' report filed and recommitted. Stephen S. Taft, Jr., appointed commissioner in place of Stephen S. Taft resigned. Pending.

Northfield, Selectmen of, petitioners. Petition for abolition of crossing on road to South Vernon. Edmund K. Turner, Charles W. Hazelton and Charles H. Innes appointed commissioners. Commissioners' report filed. James J. Irwin appointed auditor. Auditor's first report filed. Disposed of.

Hampden County.

Palmer, Selectmen of, petitioners. Petition for abolition of Burley's crossing in Palmer. Pending.

Russell, Selectmen of, petitioners. Petition for abolition of Montgomery Road crossing. Railroad Commissioners appointed commissioners. Commissioners' report filed. Thomas W. Kennefick appointed auditor. Auditor's third report filed. Disposed of.

Westfield, Attorney-General, petitioner. Petition for abolition of grade crossings at Lane's and Lee's crossings in Westfield. Patrick H. Cooney, Richard W. Irwin and Franklin T. Hammond appointed commissioners. Chas. E. Hibbard appointed commissioner in place of Richard W. Irwin, resigned. Commissioners' report filed. Walter F. Frederick appointed auditor. Auditor's third report filed. Pending.

Hampshire County.

Amherst, Selectmen of, petitioners. Petition for abolition of grade crossings at Whitney, High and Main streets. Railroad Commissioners appointed commissioners. Pending.

Belchertown, Selectmen of, petitioners. Petition for the abolition of crossing of road from Belchertown to Three Rivers and road from Bondville to Ludlow. Edmund K. Turner, F. G. Wooden and George P. O'Donnell appointed commissioners. Commissioners' report filed. Wm. H. Feiker appointed auditor. Auditor's first report filed. Disposed of.

Middlesex County.

Acton, Selectmen of, petitioners. Petition for abolition of Great Road crossing in Acton. Benj. W. Wells, George D. Burrage and William B. Sullivan appointed commissioners. Commissioners' report filed. Fred Joy appointed auditor. Pending.

Belmont, Selectmen of, petitioners. Petition for abolition of crossings at Waverley station. Thomas W. Proctor, Patrick H. Cooney and Desmond FitzGerald appointed commissioners. Pending.

Chelmsford, Selectmen of, petitioners. Petition for abolition of grade crossing at Middlesex Street. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Marble Street crossing. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Concord Street crossing. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Waverly Street crossing. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Bishop Street crossing. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Hollis and Waushakum streets crossings. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Claflin Street crossing. Pending.

Framingham, Selectmen of, petitioners. Petition for abolition of grade crossing at Willis Crossing. Pending.

Lowell, Mayor and Aldermen of, petitioners. Petition for abolition of Middlesex and Thorndike streets crossings. George F. Swain, Patrick H. Cooney and Nelson P. Brown appointed commissioners. Pending.

Lowell, Mayor and Aldermen of, petitioners. Petition for abolition of Boston Road or Plain Street, School, Walker and Lincoln streets crossings. Arthur Lord, David F. Slade and Henry A. Wyman appointed commissioners. Commissioners' report filed. A. W. DeGoosh appointed auditor. Auditor's tenth report filed. Pending.

Lowell, Mayor and Aldermen of, petitioners. Petition for abolition of crossing at Western Avenue and Fletcher Street. Pending.

Malden, Mayor and Aldermen of, petitioners. Petition for abolition of Pleasant and Winter streets crossing in Malden. George W. Wiggin, Edmund K. Turner and Fred Joy appointed commissioners. Commissioners' report filed. Winfield S. Slocum appointed auditor. Auditor's seventh report filed. Disposed of.

Marlborough, Mayor and Aldermen of, petitioners. Petition for abolition of Hudson Street crossing in Marlborough. Walter Adams, Charles A. Allen and Alpheus Sanford appointed commissioners. Commissioners' report filed. Pending.

Newton, Mayor and Aldermen of, petitioners. Petition for the abolition of Concord Street and Pine Grove Avenue crossings in Newton. George W. Wiggin, T. C. Mendenhall and Edmund K. Turner appointed commissioners. Pending.

North Reading, Selectmen of, petitioners. Petition for abolition of Main Street crossing in North Reading. Alpheus Sanford, George N. Poor and Louis M. Clark appointed commissioners. Report of commissioners filed. Thomas W. Proctor appointed auditor. Auditor's first report filed. Disposed of.

Somerville, Mayor and Aldermen of, petitioners. Petition for abolition of Park Street, Dane Street and Medford Street crossings in Somerville. George W. Wiggin, George F. Swain and James D. Colt appointed commissioners. Commissioners' report filed. James D. Colt appointed auditor in place of Patrick H. Cooney deceased. Auditor's eleventh report filed. Pending.

Somerville, Mayor and Aldermen of, petitioners. Petition for abolition of Somerville Avenue crossing in Somerville. George W. Wiggin, George F. Swain and James D. Colt appointed commissioners. Commissioners' report filed.

James D. Colt appointed auditor in place of Patrick H. Cooney deceased. Auditor's ninth report filed. Pending.

Wakefield, Selectmen of, petitioners. Petition for abolition of Hanson Street crossing in Wakefield. Pending.

Waltham, Mayor and Aldermen of, petitioners. Petition for abolition of South Street crossing in Waltham. Geo. F. Swain, —— —— and Geo. A. Sanderson appointed commissioners. Pending.

Waltham, Mayor and Aldermen of, petitioners. Petition for abolition of Moody Street, Main Street, Elm Street, River Street, Pine Street, Newton Street and Calvary Street crossings in Waltham. Arthur Lord, Patrick H. Cooney and George F. Swain appointed commissioners. Pending.

Watertown, Selectmen of, petitioners. Petition for abolition of grade crossings at Cottage, Arlington, School, Irving and other streets in Watertown. Pending.

Wayland, Selectmen of, petitioners. Petition for abolition of grade crossing at State Road. George F. Swain, Harvey N. Shepard and Arthur W. DeGoosh appointed commissioners. Pending.

Weston, Selectmen of, petitioners. Petition for abolition of grade crossings at Central Avenue, Conant Road, Church and Viles streets. P. H. Cooney, Louis A. Frothingham and Andrew M. Lovis appointed commissioners. Pending.

Winchester, Selectmen of, petitioners. Petition for the abolition of crossing at Winchester station square. George W. Wiggin, George F. Swain and Arthur Lord appointed commissioners. Commissioners' report filed and recommitted. Pending.

Norfolk County.

Braintree, Selectmen of, petitioners. Petition for the abolition of the Pearl Street crossing at South Braintree. Patrick H. Cooney, Frank N. Nay and George F. Swain appointed commissioners. Pending.

Braintree. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of grade crossing at School, Elm, River and Union streets in Braintree. John L. Bates, Winfield S. Slocum and Arthur H. Wellman appointed commissioners. Commissioners' report filed. Pending.

Canton. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of Dedham Road crossing in Canton. Samuel L. Powers, Stephen S. Taft and Wm. Jackson appointed commissioners. Commissioners report filed. Recommitted. Agreement to dismiss filed. Pending.

Dedham, Selectmen of, petitioners. Petition for the abolition of Eastern Avenue and Dwight Street crossings in Dedham. Alpheus Sanford, Charles Mills and J. Henry Reed appointed commissioners. Commissioners' report filed. Fred E. Jones appointed auditor. Pending.

Dover, Selectmen of, petitioners. Petition for abolition of grade crossing at Springdale Avenue and Dedham and Haven streets. Public Service Commission appointed commissioners. Pending.

Foxborough. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of grade crossing at Cohasset and Summer streets in Foxborough. Samuel L. Powers, Stephen S. Taft and Wm. Jackson appointed commissioners. Commissioners' report filed. Recommitted. Agreement to dismiss filed. Pending.

Hyde Park, Selectmen of, petitioners. Petition for abolition of Fairmount Avenue and Bridge Street crossings in Hyde Park. Boyd B. Jones, Edmund K. Turner and Fred Joy appointed commissioners. Commissioners' report filed. Thomas W. Proctor appointed auditor. Auditor's third report filed. Disposed of.

Needham, Selectmen of, petitioners. Petition for abolition of Charles River Street crossing in Needham. Pending.

Quincy. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of Saville and Water streets crossings in Quincy. John L. Bates, Winfield S. Slocum and Arthur H. Wellman appointed commissioners. Commissioners' report filed. Pending.

Sharon. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of grade crossing at Depot, Garden and Mohawk streets in Sharon. Samuel L. Powers, Stephen S. Taft and Wm. Jackson appointed commissioners. Commissioners' report filed. Recommitted. Agreement to dismiss filed. Pending.

Westwood. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of Green Lodge Street crossing in Westwood. Samuel L. Powers, Stephen S. Taft and Wm. Jackson appointed commissioners. Commissioners' report filed. Recommitted. Pending.

Plymouth County.

Rockland, Selectmen of, petitioners. Petition for abolition of grade crossings at Union and other streets in Rockland. Pending.

Suffolk County.

Boston, Mayor and Aldermen of, petitioners. Petition for abolition of Dudley Street crossing in Dorchester. Thomas Post, Fred Joy and Edmund K. Turner appointed commissioners. Commissioners' report filed. James D. Colt appointed auditor. Auditor's tenth report filed. Pending.

Boston. New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of Neponset and Granite avenues crossings in Dorchester. Disposed of.

Boston, Mayor and Aldermen of, petitioners. Petition for abolition of Freeport, Adams, Park, Mill and Walnut streets and Dorchester Avenue crossings. James R. Dunbar, Samuel L. Powers and Thomas W. Proctor appointed commissioners. Commissioners' report filed. Arthur H. Wellman appointed auditor. Auditor's twenty-second report filed. Pending.

Boston, Mayor and Aldermen of, petitioners. Petition for the abolition of the Essex Street crossing in Brighton. George W. Wiggin, William B. French and Winfield S. Slocum appointed commissioners. Disposed of.

Boston, Mayor and Aldermen of, petitioners. Petition for abolition of Blue Hill Avenue and Oakland Street crossings in Boston. William B. French, Arthur H. Wellman and George A. Kimball appointed commissioners. Commissioners' report filed. Fred E. Jones appointed auditor. Auditor's twenty-first report filed. Disposed of.

Boston, Mayor and Aldermen of, petitioners. Petition for abolition of all crossings in East Boston. George W. Wiggin, William B. French and Edward B. Bishop appointed commissioners. Commissioners' report filed. Winfield S. Slocum appointed auditor. Auditor's seventeenth report filed. Disposed of.

Boston, Mayor and Aldermen of, petitioners. Petition for abolition of crossings at Saratoga, Maverick and Marginal streets in East Boston. Railroad Commissioners appointed commissioners. Commissioners' report filed. Robert O. Harris appointed auditor. Auditor's second report filed. Pending.

Revere, Selectmen of, petitioners. Petition for abolition of Winthrop Avenue crossing in Revere of the Boston, Revere Beach & Lynn Railroad. Pending.

Worcester County.

Clinton, Selectmen of, petitioners. Petition for abolition of Sterling, Water, Main, High and Woodlawn streets crossings. George W. Wiggin, William E. McClintock and James A. Stiles appointed commissioners. Commissioners' report filed. David F. Slade appointed auditor. Frederic B. Greenhalge appointed auditor in place of David F. Slade deceased. Auditor's twelfth report filed. Pending.

Harvard. Boston & Maine Railroad, petitioner. Petition for abolition of a grade crossing near Harvard station. Pending.

Hubbardston, Selectmen of, petitioners. Petition for abolition of Depot Road crossing in Hubbardston. Pending.

Leominster, Selectmen of, petitioners. Petition for abolition of Water, Summer, Mechanic and Main streets crossings. George W. Wiggin, George F. Swain and Charles D. Barnes appointed commissioners. Commissioners' report filed. Recommitted. Pending.

Southborough, Selectmen of, petitioners. Petition for abolition of crossing on road from Southborough to Framingham. Samuel W. McCall, Louis A. Frothingham and Eugene C. Hultman appointed commissioners. Commissioners' report filed and recommitted. Pending.

Southborough, Selectmen of, petitioners. Petition for abolition of Main Street crossing at Fayville in Southborough. Pending.

Southbridge, Selectmen of, petitioners. Petition for abolition of grade crossings at Foster, Central and Hook streets. George F. Swain, P. H. Cooney and William F. Garcelon appointed commissioners. Pending.

Webster, Selectmen of, petitioners. Petition for abolition of grade crossing at Main Street. Pending.

West Boylston. Boston & Maine Railroad Company, petitioners. Petition for abolition of Prescott Street crossing. Pending.

Worcester, Mayor and Aldermen of, petitioners. Petition for abolition of crossings at Exchange, Central and Thomas and other streets. Arthur Lord, George F. Swain and Fred Joy appointed commissioners. Pending.

Worcester, Mayor and Aldermen of, petitioners. Petition for abolition of Grafton Street crossing and eight other crossings, including alterations of Union Station. James R. Dunbar, James H. Flint and George F. Swain appointed commissioners. Commissioners' report filed. James A. Stiles appointed auditor. Auditor's seventy-first report filed. Pending.

RULES OF PRACTICE

In Interstate Rendition.

Every application to the Governor for a requisition upon the executive authority of any other State or Territory, for the delivery up and return of any offender who has fled from the justice of this Commonwealth, must be made by the district or prosecuting attorney for the county or district in which the offence was committed, and must be in duplicate original papers, or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney: —

(*a*) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled.

(*b*) That, in his opinion, the ends of public justice require that the alleged criminal be brought to this Commonwealth for trial, at the public expense.

(*c*) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(*d*) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(*e*) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(*f*) If the fugitive is known to be under either civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(*g*) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever; and that, if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(*h*) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(*i*) If the offence charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretences, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason given for the absence of such affidavit.

2. Proof by affidavit of facts and circumstances satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the State where the alleged crime was committed at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate. (A notary public is not a magistrate within the meaning of the statutes.) It must also be shown that a complaint has been made, copies of which must accompany the requisition, such complaint to be accompanied by affidavits to the facts constituting the offence charged by persons having actual knowledge thereof, and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

5. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrant, must be duly certified.

6. Upon the renewal of an application, — for example, on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, — new or certified copies of papers, in conformity with the above rules, must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.